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No. 2265

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT.

MULTNOMAH MINING, MILLING AND DEVELOP-
MENT COMPANY, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record.

*Upon Appeal from the United States District Court
for the Eastern District of Washington,
Northern Division.*

VOLUME II.
Pages ~~419~~ to 883 Inclusive

649

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United States Circuit Court of Appeals

FOR THE
NINTH CIRCUIT.

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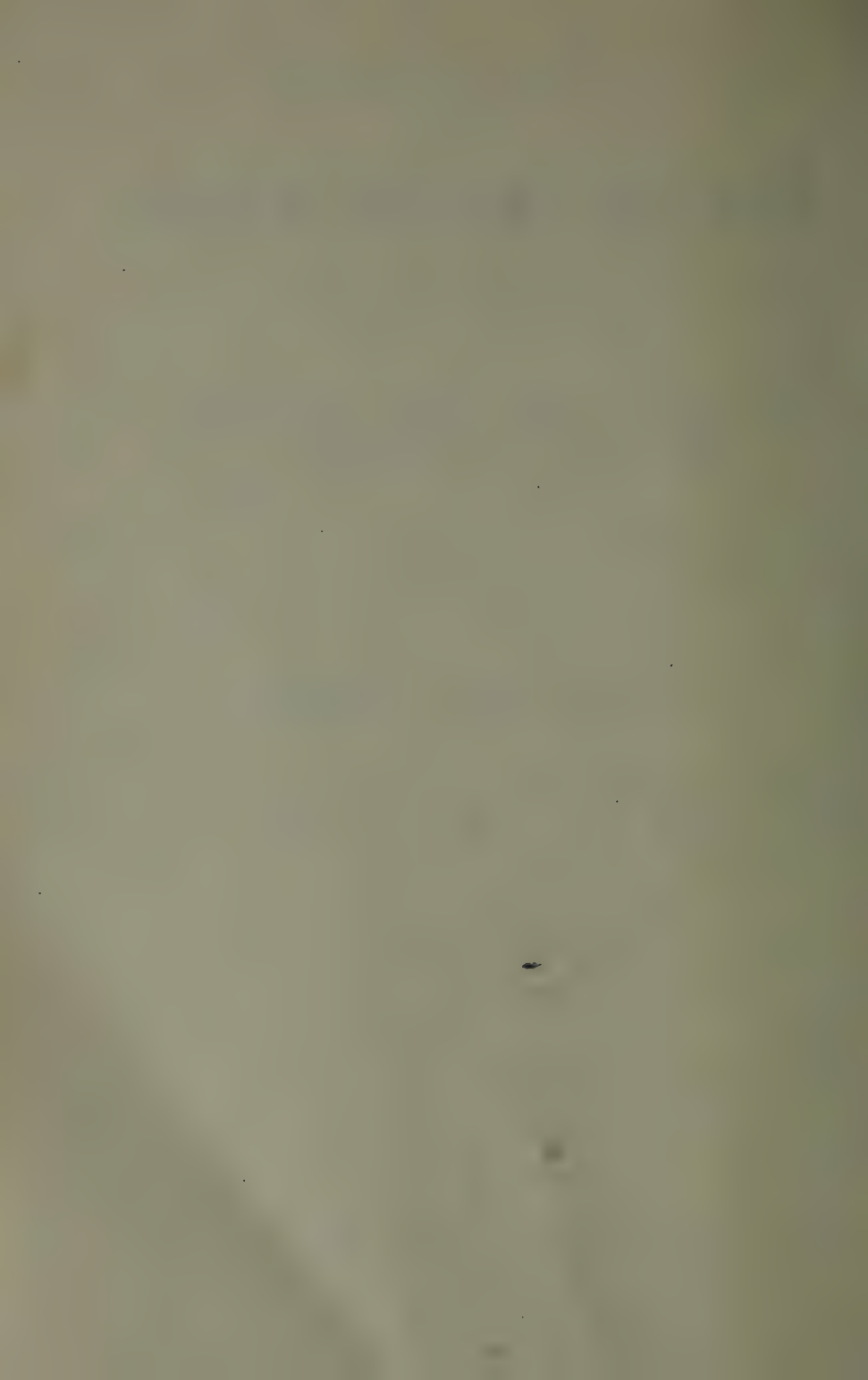
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649



Testimony of F. O. Hudnutt.

A. Yes, sir.

(Paper marked complainant's exhibit No. 11).

Mr. AVERY: I offer this last paper in evidence.

Mr. BLAIR: No objection.

Q. Doctor, I think you told me, but I am not sure, when this exhibit No. 10 was issued?

A. I think that was printed—when it was printed?

Q. When it was issued or distributed?

A. It was issued in 1907.

Q. I believe in your other answer you said 1907 or '08, didn't you?

A. Yes, but 1907 was when it was printed.

Q. And issued thereafter?

A. It was issued about that time, at the end of the year.

Q. I call your attention to a pamphlet, a printed pamphlet or sheet with what appears to be 6 pages and this is a folder entitled "Looking Backwards," do you recognize that Doctor—it is signed at the bottom, "Dr. F. O. Hudnutt"?

A. Yes, sir.

Q. Do you recognize that?

A. Yes, sir.

Q. Was that issued by the company?

A. That was issued by me.

Q. Well the company knew that you issued it, didn't it?

A. Well I suppose it did, yes, sir.

Q. The company also knew that you issued exhibit 10, didn't it?

Testimony of F. O. Hudnutt.

A. Which was 10?

Q. Yes, sir.

A. Yes, sir.

Q. Referring to this folder, "Looking Backwards," when was that issued?

A. I could not say—Feb. 22, 1909.

Mr. AVERY: I offer this in evidence.

Mr. BLAIR: I have no objection.

(Exhibit marked complainant's exhibit No. 12).

Q. I call your attention to the map in exhibit 11—the second map in exhibit 11, which is on the next to the last page, and which is entitled "Nespelem Mining, Milling & Development Company, Moses Mining District, Okanogan County, Washington", and I ask you if what appears to be the claims located on that map are the claims belonging to the defendant?

A. No, sir, part of them are.

Q. Which part are they?

A. These claims up here (indicating).

Q. You refer to—?

A. What is called the Squaw Mountain, the Squaw Hump claims.

Q. Just indicate the Squaw Hump Mountain?

A. This is it (indicating).

Q. You have other claims besides those, are they on this map?

A. They don't show on this map because they are north of it.

Q. They are north of it?

Testimony of F. O. Hudnutt.

A. Yes, this was an old map that was gotten out a long time ago.

Q. These last three exhibits that I have been calling your attention to, numbers 10, 11 and 12 were not given to me by you, were they?

A. No, sir.

Q. Or by any one interested in the company as far as you know?

A. Not that I know of.

Q. Now, Doctor, calling your attention to defendant's exhibit "F"?

A. Yes, sir.

Q. I noticed that when you formerly put that in evidence you took the contents from two small bottles?

A. Yes, sir.

Q. And put them in there?

A. Yes, sir.

Q. And the two small bottles, the contents of them, constitute what is now in this defendant's exhibit "F"?

A. Yes, sir.

Q. Is there any particular reason why those were separated before they were put in this exhibit "F"?

A. No, sir, only for this reason that I had two bottles in my pocket that time and I filled one and didn't have enough—I filled it full and shook it down and crowded it in and found I didn't have room in filling that and so I put the balance in the small bottle. I had two or three bottles that was used. I think I could put all of it in one of these bottles?

Q. Have you got those two bottles now with you?

Testimony of J. R. Gilfellen.

A. Yes.

(Witness produces them)

By Mr. AVERY: I think that is all.

Witness excused.

By Mr. BLAIR: I wish to recall Mr. Gilfellen and ask him a few questions on direct examination.

J. R. GILFELLEN, recalled for further examination, already sworn.

DIRECT EXAMINATION (Cont.)

By Mr. BLAIR:

Q. Mr. Gilfellen I want to ask you with reference to your knowledge upon the presence or absence of bed-rock or bedrock clay upon the Peabody and Wickman placers. Can you state what is your knowledge in that particular?

A. Well on the Peabody, on the south side of the Nespelem where the large bank of gravel is the clay bed-rock shows along the low water mark about, well two-thirds of the way along the high bank of gravel, and then on this strip of land that is vacated here along the bank—on this strip of ground in '98 we found the clay bedrock on the bank of the river pretty well exposed, oh between 300 and 400 feet over there.

Q. Is there any clay to the north in the Panhandle up there?

A. How is that?

Q. Is there any clay in the Panhandle—this narrow strip up here (indicating)?

A. Up here (indicating)?

Q. Yes, sir.

Testimony of J. R. Gilfellen.

A. There is large banks of clay there.

Q. State whether or not that clay runs along the Columbia and on to the excluded strip?

A. For about 300 or 400 feet.

Q. At what level does it appear along the Columbia, that is with reference to the water mark of the river, high water or low water mark of the Columbia?

A. Well the Columbia was middling low when we were there and it was just a little above the water mark.

Q. You stated that you noticed this on the Nespelem, was that on one side or both sides?

A. On the one side, the south side.

CROSS EXAMINATION.

By Mr. AVERY:

Q. Where did you see the clay there for 300 or 400 feet?

A. On this strip.

Q. On the excluded strip?

A. Yes, sir.

Q. How deep was it?

A. I don't know that.

Q. How much below the surface?

A. Well in places, different distances.

Q. From 8 to 30 feet?

A. Well somewhere from 15 to 35 or 40.

Q. Somewhere from 15 to 35 or 40?

A. Yes, sir.

Q. How deep was the gravel above it?

A. Well it runs there from 4 to 10 or 12 feet, something like that. I didn't make any measurement of it.

Testimony of L. K. Armstrong.

Q. That clay along the excluded strip dips to the southeast, I believe, doesn't it?

A. I don't know what you mean by dips.

Q. Well don't you know what I mean by dipping?

A. Well there is a ditch, ledge and face.

Q. Is there a dip to the clay bedrock—one of the defendant's witnesses testified that the clay at the mouth of the Nespelem dipped to the southeast and I want to know if that is the fact?

A. Well I never went in on the clay far enough to know how far, which way it dipped—didn't pay any attention to the dip of it.

Witness excused.

L. K. ARMSTRONG, a witness called on the part of the defense, was duly sworn, and testified as follows:

DIRECT EXAMINATION.

By Mr. BLAIR:

Q. Your name is?

A. L. K. Armstrong.

Q. Where do you reside?

A. Spokane.

Q. How long have you lived in Spokane?

A. 19 years.

Q. What is your business or profession, Mr. Armstrong?

A. Mining engineer.

Q. Have you ever done any mining?

A. Have I ever mined?

Q. Yes, sir?

Q. You are by profession a mining engineer, are you?

Testimony of L. K. Armstrong.

A. Yes sir, I am.

Q. How long have you practiced that profession?

A. More than 20 years.

Q. How long have you been in Spokane?

A. 19 years.

Q. Have you been practicing your profession as mining engineer here during that time?

A. I have.

Q. Have you ever had any experience in placer mining?

A. I have.

Q. In a practical way?

A. Yes, sir.

Q. In a professional way also?

A. I have.

Q. State where you had experience in a practical way?

A. In the Black Hills.

Q. The Black Hills in—?

A. South Dakota.

Q. Will you state the nature and length of your experience there and what you did?

A. I was working for other people about three or four months, I have forgotten just now.

Q. What was the nature of the placer proposition there?

A. Ground sluicing.

Q. How is that?

A. Ground sluicing.

Testimony of L. K. Armstrong.

Q. Have you ever done any practical work in the working of placers elsewhere?

A. I have.

Q. Where is that?

A. In Washington.

Q. What part?

A. In the Swauk District in Kittitas County.

Q. What was the nature of the work and your connection with it?

A. Hydraulic mining.

Q. Is that located in any mountains?

A. In the Cascade Mountains.

Q. Cascade Mountains?

A. Yes, sir.

Q. Hydraulic mining?

A. Hydraulic mining.

Q. What was your connection with this work?

A. Manager of the property.

Q. And as manager what were your duties—what did you do?

A. I authorized and oversaw the work to be done, the character of it and saw that the work was carried out.

Q. Did you direct the work—did you direct the manner of mining?

A. I did.

Q. State the nature of your work upon that place with reference to machinery used?

Mr. AVERY: I think I will object to that as immaterial.

Testimony of L. K. Armstrong.

Q. You may answer?

A. The method of operation is by hydraulicking—what is known as the hydraulic method. We put the water upon the ground to be mined, under a head and pressure by means of a steel pipe and giant.

Q. The steel pipe had water flowing through it I suppose?

Mr. AVERY: Without making a specific objection to each question I object to all questions and answers concerning the witness' method of operation at this point that he speaks of in the Swauk district, on the ground that it is immaterial and incompetent. I will not repeat the objection each time.

A. Yes sir.

Q. State the nature of the placer at the Swauk district, at this place, with reference to its topography and elevation of the water there above the property and its general features?

A. The operation has been conducted on a bench, gravel bench and the water used on the property has been from two sources, one under a hundred foot head and the other under a hundred and twenty-five foot head.

Q. What was the nature of the ground worked?

A. Gravel.

Q. Did you have any bedrock there?

A. We did.

Q. What was the character of that?

A. The bedrock alternated between sandstone and slate and shales.

Q. Are you connected with the properties now?

Testimony of L. K. Armstrong.

A. I am.

Q. Can you state the cost of mining on that ground per cubic yard?

Mr. AVERY: In addition to the grounds already stated I make the particular objection to that that it is immaterial.

A. Yes, sir.

Q. Give us that approximately?

A. About 10 cents.

Q. Per cubic yard?

A. Per cubic yard.

Q. And that was the cost?

A. Yes, sir.

Q. Now have you done any other—have you ever done any other placer mining by hydraulicking?

A. I have.

Q. Where?

A. In Southern Oregon.

Q. Where was that?

A. In west from Gold Hill, about four miles from Gold Hill.

Q. How was that worked?

A. The method of operation was by hydraulicking.

Q. State the head of water, and so on?

A. We had a 60 foot head.

Q. What is that?

A. 60 foot.

Q. And how did you work it with reference to the appliances used?

Testimony of L. K. Armstrong.

A. We used similar appliances to what they do in all hydraulic mining, that is a giant—

Q. How did you convey the water to the giant?

A. Through a steel pipe.

Q. What was the character of the soil or dirt?

A. It was gravel, with a top sub-soil—top soil.

Q. Can you state approximately the cost?

A. The cost was about 5 cents per cubic yard.

Q. What was the head of water there, did you state?

A. 60 feet.

Q. Can you go further, Mr. Armstrong, and tell your professional connections with reference to any public or professional work that you have done?

A. I have made examinations of placers.

Q. What places?

A. I have made examinations of placer properties in Montana, Idaho, Oregon, Washington and British Columbia.

Q. For what purpose did you make those examinations?

A. For the purpose of reporting to other people on the advisability of investment.

Mr. AVERY: I would like to change the form of my objection as it would not go to this Oregon experience and others that he has given and I want it understood that my objection as to the Swauk Mountain applies to all of the experiences that have been testified to at other places, other than Nespelem.

Mr. BLAIR: All right.

Mr. ARMSTRONG: Swauk district.

Testimony of L. K. Armstrong.

Mr. BLAIR: He meant Swauk District.

Q. Are you a member of any institute?

A. Mining?

Q. Yes.

A. I am.

Q. Of what are you?

A. I am a member of the American Institute of Mining Engineers and of the Canadian Mining Institute.

Q. Have you ever done any panning, Mr. Armstrong—panning of gold?

A. Yes, sir.

Q. To what extent or how frequently would you say you have done this during your work in the placers that you have mentioned, the two placers that you have just mentioned—outside of the two?

A. I could not say specifically how often or frequently—perhaps two or three times a season, something like that.

Q. That is, you panned two or three times a season?

A. Approximately, yes sir.

Q. Are you familiar, Mr. Armstrong, with the Wickman and Peabody placers?

A. I am.

Q. Have you been upon them?

A. I have.

Q. For what purpose?

A. For the purpose of examination.

Q. When was that?

A. In June of this year.

Testimony of L. K. Armstrong.

Q. You went there at the application of the defendant?

A. I did.

Q. And upon my advice?

A. I did.

Q. Now, Mr. Armstrong, will you state the general configuration or the topography of the ground just back of the Wickman placer?

A. To the North?

Q. To the North?

A. It is rocky, broken by ravines.

Q. Those ravines lead down upon the property?

A. They do.

Q. Have you examined the property for the purpose of finding the appearance of gravel upon it?

A. I did.

Q. Will you state the result of that examination—where you found gravel?

A. I found gravel beginning above the cabin, would be the Peabody Placer, where exposures below the surface had been made, either artificially or by nature and at two or three points on the Wickman,—one place where a gully runs through it and one place where the ditch was dug.

Q. When you say ditch you refer to improvement No.—?

A. Improvement No. 3, I think it is.

Q. As appears upon the Wickman and Peabody Placers?

A. Yes, crosses them.

Testimony of L. K. Armstrong.

Q. Did you examine the south bank of the Peabody Placer?

A. I did.

Q. State the nature of the gravel deposit there?

A. It was gravel—the entire hill was gravel at the point where I examined it, which extends up to nearly opposite the cabin.

Q. What was the elevation of the gravel bank from the bed of the Nespelem, in estimating the height, approximately?

A. Elevation?

Q. Yes, sir?

A. About, the Peabody 75 feet, excepting the point where it run down.

Q. Did you examine the property elsewhere than at the point mentioned, for the presence of gravel. I ask now particularly with reference to the excluded strip, so-called?

A. I don't know that I understand the excluded strip?

Q. I will call it to your attention. In referring to the excluded strip we refer to this strip immediately South of the—well—southwest of the Wickman Placer and between the Wickman Placer and the Columbia River?

A. What was the question?

Q. Did you examine that?

A. I examined that.

Q. Did you examine it at the West end of the Wickman Placer?

A. I did—outside the limit.

Testimony of L. K. Armstrong.

Q. On the Placer or outside?

A. Both.

Q. On the excluded strip what did you find in the way of gravel?

A. I found gravel.

Q. Outside the Wickman Placer to the West?

A. To the West.

Q. Did you find gravel?

A. I did.

Q. Where did you find it there?

A. Found it in the gulch.

Q. What is the character of the gulch?

A. That serves as a drainage for the country lying to the North.

Q. What is the size of the gulch?

A. I should approximate it at the point I examined it at about 40 feet deep.

Q. How far is it from the West line of the Wickman?

A. I estimate it approximately—

Q. At the point—well—first how far is that gulch—
Mr. AVERY: Did you say 45?

A. Approximately 45. I think it was in the neighborhood of 300 feet.

Q. What depth of gravel did that show?

A. The gravel showed from the bottom, at the bottom and from to within 8 to 10 feet of the surface on the opposite side from which I was standing.

Q. You spoke of gulches leading down upon the property in this crystalline area North of the Wickman, do those ravines show gravel?

Testimony of L. K. Armstrong.

A. There is one of them does.

Q. Does it show gravel?

A. On top—yes.

Q. Along the ravine—the ravine?

A. Shows gravel, yes sir.

Q. You spoke of gravel over in the ditch, at what depth from the surface did it appear?

A. It could not have been more than four feet. The ditch was not deeper than that.

Q. Basing it upon the facts that you have testified to in reference to the gravel, what, in your opinion is the truth in reference to the presence or absence of a general layer of gravel underlying these two placers?

Mr. AVERY: I object to that as incompetent. The witness has not qualified himself to answer the question. He is not competent to answer it.

Q. You may answer?

A. I have no doubt that there is, with minor exceptions.

Q. Now those rocks back to the North of the Wickman, what is the nature of those rocks?

A. They are crystalline rocks.

Q. Do you know whether or not they are mineral bearing rocks?

A. Considered so in that district?

Mr. AVERY: I move to strike out the answer as incompetent and hearsay, and a conclusion.

Q. Does it bear gold?

Mr. AVERY: I object to that as leading.

Q. What mineral does it bear if it bears any?

Testimony of L. K. Armstrong.

A. It is a common report that all the formations of the district carry gold.

Mr. AVERY: I object to that for the reason that it is incompetent and not the best evidence and a conclusion of the witness and hearsay.

At this point the hearing was adjourned until 2:00 P. M.

Spokane, Wash., July 22, 1909. 2:00 P. M.

Hearing continued, all parties being present.

L. K. ARMSTRONG, recalled for further examination.

DIRECT EXAMINATION (Cont'd).

By Mr. BLAIR:

Q. What is the nature of the surface of these two placers, Mr. Armstrong?

A. Much of it is overlaid with sand and light soil.

Q. Do you know the location of the dam on this property?

A. I do.

Q. Do you know the location of the flume bed—the flume bed that had been testified to in this case?

A. The flume bed leading from the dam?

Q. Yes, sir.

A. I do.

Q. What is the distance of the flume bed above the general level of the two placers, approximately?

A. The surface of the ground or the workable level?

Q. Well, take the surface of the ground first?

A. At the highest point I should think it was greater than 125 feet.

Testimony of L. K. Armstrong.

Q. Do you know the flow of the water in the river?

A. I do.

Q. What is it?

A. I know—not by measurement.

Q. What is the flow of the water in the river?

A. Estimating it at the time I visited the property in June—

Mr. AVERY: You mean you estimated it?

A. Yes, sir

A. At 3,000 miners inches.

Q. Did you look over the properties with reference to being hydraulickable?

A. I did.

Q. Did you?

A. I did.

Q. What was your opinion—what is your opinion in respect to that?

Mr. AVERY: I object to that as indefinite and incompetent.

Q. You may answer?

Mr. AVERY: I object as calling for a conclusion.

Mr. BLAIR: I am asking for his conclusion. That is just what we are after.

A. I regard the ground as economically valuable.

Q. By hyrdaulicking?

A. By hydraulicking for placer purposes.

Q. For placer purposes?

A. For placer purposes.

Q. Will you state those considerations found there

Testimony of L. K. Armstrong.

by you which leads you to that opinion—lead you to that opinion, and which it the most important?

A. I found abundant water with sufficient head, a good body of gravel and ample dumpage facilities.

Q. What is the head of water there?

A. Depends entirely where from. It is about 200 feet from the workable level, the top of the dump, or the bed of the flume.

Q. State whether it is possible to work these placers in a hydraulic way from the present dam level?

A. Yes, sir.

Q. State whether or not in your opinion that is a favorable location from which to work?

A. That is a favorable level from which to work on the two placers—it is a favorable level.

Q. State the level which in your opinion is the most favorable for working the placers,—that is, so far as head of water is concerned?

A. That is a question,—which might be two questions in there. We found conditions on the ground which were very favorable,—a high head—not too high,—gravel in quantity,—ample water and a good dump.

Q. What is the dump that you refer to?

A. The place where the debris or tailings, so called, may be deposited.

Q. Where would you place the dump?

A. In the Columbia river.

Q. Are you familiar with the location of the flume bed, the flume cut shown on defendant's exhibit "I"?

A. I am.

Testimony of L. K. Armstrong.

Q. Also on defendant' exhibits "G" & "H"?

A. I am.

Q. State whether that flume bed is properly or improperly placed for the working of the property by the hydraulic method?

A. Properly.

Q. State how that flume level would be used properly, the flume bed shown here would be used?

A. The flume bed would be used for the bed of a flume conducted with proper grade, approximtaily at that level, around the hill front to the point at whatever ground might be worked, from which the ground might be worked.

Q. And after conducting it around the hill front what disposition would you make of the water and in what way?

A. I should deliver it onto the ground to be worked through a steel pipe.

Q. And for working it you would use the ordinary appliances would you?

Mr. AVERY: I object to that as leading.

A. I would.

Q. What appliances in addition to the steel pipe would you use?

A. In connection with the steel pipe?

Q. Yes, sir.

A. I should use a giant at the end.

Q. What is the ordinary method of hydraulicking?

A. Ordinary method—cutting down the bank.

Q. Have you made an estimate of the cost required

Testimony of L. K. Armstrong.

for placing a hydraulicking plant upon that property?

Mr. AVERY: I object to that upon the ground that it is incompetent and that the witness has not shown himself qualified to answer the question.

A. Roughly.

Q. Do you know the general cost of placing a hydraulicking plant upon the property?

Mr. AVERY: I make the same objection and, in addition, the one that the question is not definite.

A. Approximately.

Q. Will you state the various items of expenditure that would be necessary upon this property?

Mr. AVERY: I object as not being competent and also the witness has not shown himself qualified to answer the question and the question is too indefinite.

Q. You may answer.

A. Can I have the question read?

Q. Will you state the various items of expenditure that would be necessary upon this property—you may first answer whether you know?

A. I know.

Q. Will you please state?

Mr. AVERY: I make the same objection.

A. The construction of a flume at a sufficient grade around the front of the hill to a point approximately 6000 feet from the dam, of suitable proportions to carry 3,000 to 5,000 inches of water,—together with bridge work such as may be necessary, and pressure boxes at suitable points; construction of a ditch at a lower—suitable level, in which considerable fluming would be

Testimony of L. K. Armstrong.

required to convey the water around for sluice water; equipment; pipes of sufficient size and length, together with gates and standpipe?

Mr. AVERY: With equipment pipes, is that right?

A. I didn't mean to say that,—air pipes; giant; lighting plant; sluices, and the usual gold saving devices therein. Should I also state the buildings and tools and shops and things of that sort. I am not including those.

Mr. AVERY: Is that part of the necessary things?

A. Buildings, tools, shovels, etc.?

Q. Yes, sir.

A. Yes, sir.

Q. Approximately what would be the cost, if you made an estimate?

Mr. AVERY: I make the same objection.

A. I have.

Q. What is your estimate?

A. For such a plant as I have outlined here, in greater detail, approximately \$50,000.00. I wish to say that this includes the sawmill necessary for sawing the lumber and other items connected with that.

Q. Have you estimated the approximate cost per cubic yard for working these placers?

Mr. AVERY: I object to that for the same reason—the last stated objection.

A. I have.

Q. Can you state that estimate?

A. Not to exceed 4 cents per cubic yard.

Q. Do you know Mr. Armstrong, the amount of horsepower contained in the river?

Testimony of L. K. Armstrong.

A. Horse power is a relative term and in order to know the horsepower of any stream it is necessary to know at what point it is to be used at and that sort of thing. If I may know definitely at what point below it is to be used I could state more specifically.

Q. Well, give the horsepower at—do you know the location of the foundation for the power house spoken of heretofore by the witnesses?

A. I know the location of a foundation said to be a power house.

Q. Relatively with the flume bed?

A. Relatively with the flume bed, yes sir.

Q. About what is the fall at that point?

A. As I recall it it is about 125 feet.

Q. Have you estimated the horsepower there?

A. I did not estimate it, no sir, I did not.

Q. You say 125 feet?

A. Yes, as I recall it.

Q. You didn't measure it.

A. I did not.

Q. Well, Mr. Armstrong, I call your attention to a plat marked complainant's exhibit No. 4, and call your attention to improvement ditch No. 3 running across those two properties and ask you whether that ditch is available for placer mining purposes upon those two placers?

A. Yes, sir.

Q. Will you describe the principal function of that ditch—the way in which it can be used?

A. To connect it at the point where it is disconnected

Testimony of L. K. Armstrong.

—and of course with the water, it would furnish what I have formerly referred to as sluice water which we use in the washing of the gravel in all the sluices.

Q. Do you know how far its eastern end is from the river?

A. At its eastern end?

Q. Yes, sir.

A. Near by—just the distance I don't know,—easily connected.

Q. In what way could it be connected?

A. Might be connected by a flume.

Q. Could you connect it by a pipe?

A. Might be connected by a pipe.

Q. Mr. Armstrong, did you do any panning upon these properties when you went down there?

A. I did.

Q. Where did you pan?

A. I panned along the Nespelem river on both sides.

Q. Did you find any gold?

A. I did.

Q. What was the character of gold you found in point of size?

A. It was comparatively coarse, easily distinguishable without the aid of a microscope as individual particles, with few exceptions.

Q. I will call your attention to defendant's exhibit "F", and ask you to look at the contents.

(Witness does so).

Q. Can you state whether or not the gold found by you is similar to the gold contained in the bottle?

Testimony of L. K. Armstrong.

Mr. AVERY: I object to that as leading.

A. Similar.

Q. Did you weigh any of the particles found by you?

A. I did.

Q. How many did you weigh?

A. I weighed 17.

Q. What did they amount to in point of value?

A. I first weighed—

Mr. AVERY: I object to that as calling for a conclusion and it is incompetent.

Q. You may answer?

A. A trifle over one cent.

Q. State whether or not they were or were not the average colors found by you?

A. Three of these pieces weighed one-half cent.

Q. Three of them weighed a half a cent?

A. Three of them weighed a half a cent, were the largest that I, myself, found. The other fourteen were among the smallest particles which I took from all the pannings which I made.

Q. Do you know the number of particles found by you in your panning, approximately, that is, in your average pan?

A. I estimated the average pan at 12 particles.

Q. Basing your estimate upon the testimony of the complainant that there were 150 pans contained in a cubic yard, what would be the value per cubic yard?

Mr. AVERY: I object. That is a matter of computation and also it is not based on anything except the counsel's statement and also on the ground that a pan

Testimony of L. K. Armstrong.

of dirt may in some places, I understand, be larger than another pan of dirt, pans of dirt may vary and those taken by one person vary from those taken by another.

Q. You may answer?

A. About 12 cents.

(Defendant's exhibits Nos. K, L, M, N, O, P, Q, R, & S, marked).

Q. Calling your attention, Mr. Armstrong, to defendant's exhibit "K", to this which is marked defendant's exhibit "K", I ask you what that is?

A. A photograph of a portion of the Peabody placer looking on the south side of the Nespelem river.

Q. Will you state what that photograph shows?

Mr. AVERY: I object to that. The photograph speaks for itself, and it is not the best evidence and the witness' conclusion about a paper which shows on its face what it is,—that photograph shows what it is.

A. Did you see the place depicted in the photograph or picture at the time it was taken?

A. I did.

Q. Will you state what it is and what it shows?

Mr. AVERY: I make the same objection.

A. This is a photograph of a portion of the Peabody Placer on the south side of the Nespelem river, a gravel bank more than 75 feet high.

Mr. BLAIR: I offer that in evidence.

Mr. AVERY: I object to the writing on the reverse side of the picture, except the writing "Defendant's exhibit "K"."

Q. I call your attention, Mr. Armstrong, to the writ-

Testimony of L. K. Armstrong.

ing on the back of the picture and ask you whether it states the truth in respect to that which appears on the front?

Mr. AVERY: I object to that as not the best evidence and leading and incompetent.

Q. You may answer.

A. The writing on the reverse side is the fact so far as it goes.

Q. I also call your attention to the writing on the back of the exhibits of defendant from "K" to "S", both inclusive, and ask you who made that writing, that is, other than that part which is the words "Defendant's exhibit" in each case.

Mr. AVERY: I object to that as immaterial and incompetent and the papers are not the best evidence.

Mr. BLAIR: I will offer them.

Q. I ask you who did the writing on these papers just mentioned with the exception of the words I have stated?

A. I did.

Q. State whether or not those writings or inscriptions state the truth with respect to what appears on the front?

Mr. AVERY: I object to this for the picture shows for itself without any explanation and for the second reason it is incompetent and not the best evidence and misleading.

A. Well, I should have to look at the front and see.

Q. I call your attention to defendant's exhibit "L", Mr. Armstrong, and ask you to tell what that is?

A. That is a view—

Testimony of L. K. Armstrong.

Mr. AVERY: I make the same objection. The picture shows for itself,—and is incompetent.

A. Boulders and gravel along the bench line of the Wickman placer.

Q. State whether or not the inscription upon the back—?

A. The inscription upon the back is a fact.

Mr. BLAIR: I offer that in evidence, this defendant's exhibit "L" in evidence.

Mr. AVERY: I object to the admission of defendant's exhibit "L", and to that part of it which appears on the back, except the exhibit mark, for the reason stated in respect to that.

Mr. BLAIR: In respect to all of these pictures you may have the same objection in the same way.

Q. I call your attention to defendant's exhibit "M" and ask you what it is?

A. That is a picture of the gorge leading from the foothills across both the Wickman and Peabody placers any emptying on the lower ground on the North side of the Nespelem river.

Q. Where was this particular picture taken, on the Wickman or Peabody?

A. Taken as near the line as I could get.

Q. Refer to the inscription on the back and state whether or not it is true?

A. It is.

Mr. AVERY: I make the same objection. These objections that I have made in respect to these photographs go to all of them.

Testimony of L. K. Armstrong.

Mr. BLAIR: I offer defendant's exhibit "M" in evidence.

Mr. AVERY: Same objection.

Q. I call your attention to defendant's exhibit "N" and ask you what that is?

Mr. AVERY: Same objection.

A. Showing the character of the ground on a point north of the Nespelem river, at a point on the North side of the Nespelem river.

Q. What does it show,—on the surface?

A. That is the surface, yes sir.

Q. Refer to the inscription on the back and state whether or not that accords with the truth?

A. It does.

Mr. BLAIR: I offer in evidence defendant's exhibit "N".

Q. I call your attention to defendant's exhibit "O" and ask you what that is?

A. That is another photograph taken on the North side of the Nespelem river showing the character of the boulders and gravel on the Peabody placer.

Q. In respect to the inscription on the back, is it correct?

A. It is correct.

Mr. BLAIR: I offer defendant's exhibit "O" in evidence.

The complainant takes the same objection.

Q. I call your attention to defendant's exhibit "P" and ask you what that is?

A. That is a photograph taken on the North side, a

Testimony of L. K. Armstrong.

point on the North side of the Nespelem river showing the gravel in the Peabody placer.

Q. I call your attention to the inscription on the back and ask you whether it is true?

A. It is.

Mr. BLAIR: Now I offer defendant's exhibit "P" in evidence. The same objection by complainant.

Mr. AVERY: These are all under my objection.

Q. I call your attention to defendant's exhibit "Q" and ask you whether the inscription upon the back of it is true?

A. It is.

Q. What does that photograph show?

A. It shows the character of the gravel at a point on the North side of the Nespelem river on the Peabody placer.

Mr. BLAIR: I offer defendant's exhibit "Q" in evidence.

Q. I also call your attention to defendant's exhibit "R" and ask you what that is?

A. That is a photograph which I took of a point on the South side of the Nespelem river of a low bench on the Peabody Placer.

Q. What is this water here (indicating)?

A. Yes, the Nespelem river.

Q. And who is the individual across there?

A. That is Dr. Hudnutt, F. O. Hudnutt.

Q. Is the inscription on the back of that correct or incorrect?

A. Correct.

Testimony of L. K. Armstrong.

Mr. BLAIR: I offer defendant's exhibit "R" in evidence.

Q. Now I call your attention to defendant's exhibit "S", Mr. Armstrong, and ask you what that is?

A. That is a photograph of a rock in a place a little to the North of the Wickman placer, showing a point where a claim,—that is a lode that has been worked upon.

Q. I call your attention to the inscription on the back and ask you whether that is correct or incorrect?

A. It is correct.

Mr. BLAIR: I offer defendant's exhibit "S" in evidence.

Q. How far is that rock removed from the North line of the Wickman?

A. The Wickman—a hundred yards or less.

Mr. AVERY: I object to its admission on all the grounds I have stated and the additional ground that it is immaterial and incompetent because it is not on these claims and does not have a tendency to prove or disprove any issue in the case.

Mr. BLAIR: Now I offer in evidence these defendant's exhibits which have been identified by Mr. Armstrong, and in order not to overlook them,—the offering of them in evidence,—I now offer in evidence all these exhibits from "K" to "S", inclusive.

Mr. AVERY: I object because they have already been offered in evidence and on all the grounds I have stated.

Testimony of L. K. Armstrong.

CROSS EXAMINATION.

By Mr. AVERY:

Q. Mr. Armstrong, I call your attention to the second page of complainant's exhibit 10, and will ask you if you are the person photographed in there, the person to the right; there are two figures in there?

A. That looks like me; that resembles me.

Q. It is you, isn't it, Mr. Armstrong?

A. I presume it was.

Q. Do you have your office with the office of the company?

A. The company has their office with me. We are in the same office.

Q. You are a stockholder of the company?

A. I am.

Q. The defendant I refer to when I say company?

A. Yes, sir.

Mr. BLAIR: There is one thing I omitted with Mr. Armstrong and I would like to ask him about it,—Mr. Armstrong you have a little map which you were using there?

A. I have.

Q. Map marked defendant's exhibit "T".

Q. I call your attention to defendant's exhibit "T" and ask you to state what that is?

A. That is a sketch of the Wickman and Peabody Placers and the surrounding country.

Q. By whom was that made?

A. By myself.

Q. State whether that is a correct representation of

Testimony of L. K. Armstrong.

the general features of the Wickman and Peabody Placers?

A. It is fairly accurate,—meant to be accurate.

Q. State whether or not it represents the general location of the Nespelem river with reference to the Peabody Placer?

A. It does.

Q. And with reference to the gulches marked thereon?

A. It shows as accurately as was possible to get it.

Q. I call your attention to the sand dunes marked here?

A. Approximately correct.

Q. And with relation to the Columbia river?

A. Approximately correct.

Mr. BLAIR: I now offer defendant's exhibit "T" in connection with this witness's testimony and in explanation thereof.

Mr. AVERY: Q. Let me ask, Mr. Armstrong, does the arrow indicate North?

A. Yes, sir.

Q. What is that along there (indicating)?

A. Bench.

Mr. AVERY: I object to its admission in evidence because it is on its face more than a map. It is not the best evidence of what it purports to be in respect to the other features than a mere map. It is incompetent also in that it contains a statement in writing which is no part of a map.

By Mr. BLAIR:

Q. Mr. Armstrong, will you look at the writings on

Testimony of L. K. Armstrong.

the face of that and state whether or not they were made in connection with the map?

Mr. AVERY: I object to that as leading and not the best evidence and incompetent.

Mr. BLAIR: It is a matter of indifference I believe.

Q. You may answer?

A. There is absolutely nothing on that there except what should be included to illustrate the geography, topography and geology of a map.

Mr. AVERY: I move to strike the answer because it is not responsive and contains in addition to the other matters a conclusion of the witness and is not the best evidence.

Q. I ask you, Mr. Armstrong, whether or not those inscriptions made upon that paper were not made as a part of the general drawing?

Mr. AVERY: I object, the same objection as to the last question and in addition to that it is leading.

A. They were made—they are a part.

Mr. BLAIR: I offer this in evidence.

Mr. AVERY: I make the same objection to this that I have made to the others and all of the objections that I have specifically made to it.

CROSS EXAMINATION.

By Mr. AVERY:

Q. You say you placer mined in the Swauk district?

A. Yes, sir.

Q. In this State?

A. Yes, I have.

Testimony of L. K. Armstrong.

Q. How many acres did you have—were you placer mining there?

A. Approximately 100.

Q. Are you mining there now?

A. We are.

Q. Somebody else you have got to work?

A. We are operating by lease now.

Q. Well, then, you mean you simply leased the ground?

A. This year, yes sir.

Q. And you are then not operating it yourself?

A. We are operating it under a lease,—leasing it to somebody else.

Q. When they are operating usually under a lease it is at so much per year or month or season?

A. So much royalty.

Q. So much royalty?

A. Yes, sir.

Q. What are they doing there now?

A. What do you mean, doing there now,—I have not been over there for about 10 days. At that time they were operating.

Q. Drifting?

A. No, sir.

Q. Do they drift in those placers?

A. No sir, they were hydraulicking.

Q. How much steel pipe have you got in there?

A. I have forgotten just how much.

Q. Did you put in the plant?

Testimony of L. K. Armstrong.

A. Oh, yes, sure, put in the larger one and bought the other one on the ground.

Q. You don't know how much steel pipe you have?

A. I have forgotten the figure.

Q. Well, approximately what is it?

A. Several hundred feet.

Q. Well that is not very close,—that is the nearest you can put it at?

A. Yes, practically.

Q. What size pipe?

A. Nearly all is 18 inch pipe.

Q. What is the other?

A. The other is 11.

Q. What river is that on?

A. The Swauk.

Q. You said you had a 60 foot head there?

A. I didn't say so.

Q. What did you say?

A. I said with one giant we had 100 feet and with the other 125 feet.

Q. Is that all gravel?

A. Practically all gravel and surface soil.

Q. How deep is the surface soil?

A. Varies from 2 feet to 6 or 8 feet.

Q. How deep is the gravel under that?

A. Varies from 6 feet to 35 feet.

Q. Where is the bed rock—at the bottom of the gravel?

A. Yes, sir.

Q. You said the bed rock alternated, did you?

A. I went up the sides of the gulch, this gulch here

Testimony of L. K. Armstrong.

A. I said so, yes sir.

Q. You mean that part of it was in stone, is that right?

A. Yes, all stone.

Q. Did you say part of it was stone and part of it was shale?

A. A, you don't understand me. I said part was sandstone and part shale and part slate.

Q. That is not a clay bottom there?

A. No, sir.

Q. A clay bedrock?

A. No, sir.

Q. It costs, I understood you to say 10 cents per yard to mine there?

A. Approximately, yes sir.

Q. I believe you said that the past few years you have panned two or three times a season, did you not?

A. I said it averaged about that.

Q. Where did you pan to make up that average this season?

A. I panned once on the Nespelem bar.

Q. On these claims?

A. On these claims and off these claims.

Q. On the Peabody?

A. On the Peabody and Wickman.

Q. Where did you pan to make up that average?

A. I panned in—

Q. Where did you pan in 1907 to make up that average?

A. 1907?

Testimony of L. K. Armstrong.

Q. Yes, sir.

A. I panned on the Swauk.

Q. Where did you pan in 1906?

A. I have not finished—I panned in several places in Southern Oregon.

Q. In 1906 or 1907?

A. 1907.

Q. Where did you pan in 1906?

A. Panned on the Swauk.

Q. Do you remember where you panned in 1905?

A. Well, that is getting back pretty well, Mr. Avery. I can say—previous to that that I cannot say for certain as to the time that I did any of that sort of work, but I panned in Idaho in the Tyson District and I panned in Montana.

Q. 1906 or 1905?

A. No, I was just saying—say that from 1905 back I cannot answer as to the specific times or where I panned or when; I cannot tell the number of places where I did pan and the specific times when I panned.

Q. Cannot give specific years?

A. I cannot.

Q. Did you pan upon the Nespelem bar until this year?

A. I did not.

Q. Where did you pan on the Peabody?

A. Panned on both sides of the Nespelem river on the low ground.

Q. That is how far from the river, approximately?

A. Well, along the river.

Testimony of L. K. Armstrong.

Q. Along the river bank I suppose?

A. Along the river and back from the banks and on the high places here at different—here is the bench land.

Q. Now what points on the Peabody bench land did you pan?

A. I went up the sides of the gulch, this gulch here (indicating).

Q. Up the sides of the gulch on exhibit "M"?

A. Yes, sir.

Q. Is that the front part of the picture down in here (indicating)?

A. Oh, no, that is the back part into the hills, into the bench land several hundred feet from the river.

Q. How many pans did you take out of there?

A. I don't recall the number, three or four.

Q. How many did you take along the Nespelem?

A. I took along the Nespelem?

Q. Yes, on the Peabody?

A. Something over 20 pans.

Q. And where else did you take any pans on the Peabody?

A. On the Peabody I took pans from here (indicating) on this high bluff.

Q. On the South side?

A. On the South side.

Q. How many pans did you take on the South side?

A. I panned on that bluff, I panned two—panned four pans—I myself panned two of them.

Q. You panned two of them?

A. Well, I did the work.

Testimony of L. K. Armstrong.

Q. Where else did you pan on the Peabody?

A. I panned over some of these dumps—is that the improvement shaft (indicating)?

Q. You panned improvement shaft No. 2?

A. I think it was. I am not certain about that.

Q. Did you get any colors in improvement shaft No. 2?

A. Small color, yes sir. Not in the shaft.

Q. Not in the shaft?

A. No, sir, from the dump.

Q. Did you go down in the shaft?

A. I don't know whether it was that one or not.

Q. How many shafts did you go into?

A. I went into two.

Q. Where was the other one that you went into?

A. On the same ground.

Q. On the same land?

A. On the same property—you said the Peabody, didn't you?

Q. Yes, are those shafts down to gravel?

A. They are both closed.

Q. You said you found gravel on the Peabody where exposures had been made,—where there had been exposures either artificial or natural?

A. Yes, sir.

Q. Where did you find the natural exposures?

A. On the Peabody?

Q. Yes, sir.

A. Up the gulches as shown by these photographs.

Q. There are two gulches running across there are they?

Testimony of L. K. Armstrong.

A. Yes, there are more than that. There are some short ones there,—where did we find gravel, on the Peabody?

Q. Yes, sir?

A. There is one point.

Q. Where is it on the map?

A. Right here (indicating) along the South side of the Nespelem.

Q. Half way between the corner and the end line—corner 7 and the end line?

A. Yes, sir.

Q. Approximately?

A. Yes, sir.

Q. Were those natural exposures?

A. Natural exposures there in one place.

Q. On what exhibit is that?

A. That is exhibit "K"; the bank on the West side—or the bank on the south side, I should have said, of the Nespelem river. This side should represent the frontal, of the bench on the north side of the river on the Peabody Placer, on exhibits N, O, P, & Q.

Q. The gravel in the gulches was at the bottom of the gulches I suppose?

A. There was gravel at the bottom of the gulches and on the sides as well.

Q. How much surface dirt was there upon the gravel, above I mean?

A. It varied.

Q. What size of a variation was it?

A. At the frontals, near the mouth of the gulches,

Testimony of L. K. Armstrong.

there was practically none, and as we went back towards the hills northward it increased, that is, there was sand and that increased to a foot of it, perhaps three or four, might be as much as five.

Q. How many points of gravel did you find in prospecting on the Wickman?

A. I prospected at one point up this gulch on the Wickman.

(Question read).

Q. That is exposed gravel?

A. I found gravel in the gulch extending up the Wickman.

Q. Any other place on the Wickman?

A. Yes, I found gravel along the ditch line on the Wickman.

Q. In the ditch?

A. In the ditch and on the sides.

Q. At how many points, now, did you find gravel on the Wickman?

A. I think I found gravel—I don't recall the number of holes.

Q. Well, about how many points?

A. Oh, it may have been—all the holes that I visited with one exception showed gravel.

Q. And how many holes did you visit there?

A. Six I think,—no I could not tell just exactly about it. I think three out in there (indicating) and then there was three more up the other way.

Q. You stated in direct examination, did you not, that

Testimony of L. K. Armstrong.

you found gravel in two or three points on the Wickman, two or three places?

A. I stated where I did find—

Q. Did you state that on your direct examination?

A. I don't know whether I did or not.

Q. Is it true if you did state it?

A. I stated that I did find it specifically.

Q. In two or three points, is that right?

A. Yes, sir.

Q. You examined the excluded strip here on the Wickman, off the Wickman rather?

A. I did.

Q. You are not counting that examination in saying—in discussing the examination of the Wickman, are you?

A. No, sir.

Q. How many points did you examine on the excluded strip?

A. One single point, that is, relatively—it was near here (indicating).

Q. The southerly end of it?

A. That is the southerly end.

Q. Why didn't you go on up, or rather down the Columbia river on that trip?

A. Why didn't I?

Q. Yes, sir?

A. In the first place I could not have got along there if I wanted to.

Q. And you didn't want to?

A. I had no intention of doing it. The river was

Testimony of L. K. Armstrong.

very high and washed on the bank. It would have been impossible to have gone along there at the time I was there.

Q. You panned those sand dunes did you?

A. No, I did not.

Q. Any particular reason for not panning them?

A. No particular reason one way or the other?

Q. You panned the coulee or gulch north—at the northwestern end of the Wickman did you?

A. The northwesterly end,—no I did not pan that.

Q. Did you examine it?

A. I did.

Q. Any particular reason for not panning in there?

A. No reason.

Q. Could it have been panned?

A. Might have been.

Q. Was it susceptible of panning?

A. Certainly was.

Q. What was the character?

A. Gravelly,—principally gravel.

Q. What else?

A. The usual superincumbent sand and silt.

Q. Any dirt or light soil on top?

A. The top,—I have stated the character of the soil that is on the surface.

Q. Well, state it again?

Mr. BLAIR: Now I object, as ordinary dirt might mean different things in different places. It is rather general, Mr. Avery.

Testimony of L. K. Armstrong.

Mr. AVERY: Well, if the witness doesn't want to answer it let him say so.

Mr. BLAIR: What do you mean by ordinary dirt? I don't know what you mean. The term is altogether too broad.

Mr. AVERY: I do not have to indicate what is meant by dirt.

Q. You don't know what "dirt" means then?

A. I don't know what you mean by dirt.

Q. What do you mean by dirt?

A. I didn't state dirt. I stated the exact condition of the placer surface.

Q. Then you don't know what I mean when I asked if there was any ordinary dirt on the top of the surface?

A. I stated the character of the surface.

Mr. AVERY: Very well.

Mr. BLAIR: Answer the last question?

Mr. AVERY: I will examine the witness.

Mr. BLAIR: I object to the inference.

Q. Now Mr. Armstrong, how deep is the gravel?

Mr. BLAIR: All right,—go on.

Q. Now how far from the surface did the gravel commence?

A. At what point?

Q. At the point we are discussing in the gully there which is off the northwestern end of the Wickman?

A. At what point below the surface did the gravel commence?

Q. Yes, sir.

A. A few feet.

Q. Do you know how many feet approximately?

Testimony of L. K. Armstrong.

A. Less than 10.

Q. How deep down did it go?

A. To the bottom of the gulch.

Q. That would be about how many feet did you estimate?

A. That gulch had a rapid fall, Mr. Avery, to the point I now have in mind—it was about, I think, 40 feet.

Q. Now was that gravel all of the same character in this thickness. Was the top of the gravel the same as the bottom?

A. No it was not.

Q. What is that?

A. It was alternating.

Q. Will you describe it as near as you can?

A. I don't think that I can in detail.

Q. Did you make a very careful examination of it?

A. I looked at it.

Q. But you don't think you can describe it in detail. I am right about that, am I, Mr. Armstrong?

A. I could not specifically,—I could not. I remember that it was gravel about the point I stated.

Q. How about the gravel that you discovered, when you did discover it in the gulch, in the gulches of the Peabody and Wickman—how was the gravel at the point nearest the surface, what was its character?

A. In some cases it was very coarse and some cases it was fine, finer.

Q. Coarse and fine, of course, is a more or less relative term. What do you mean by coarse gravel?

A. It was gravel made up of variable sized rocks.

Testimony of L. K. Armstrong.

Q. Could you give any more definite description of it?

A. Yes I think I can. I can state that there was not anything that I saw that might not be moved by such a hydraulicking plant as I have suggested to put on the property.

Q. I am asking you if you can describe it?

A. It varies from fine gravel up to perhaps—oh, perhaps 18 inches to two feet in diameter.

Q. That was that nearest the surface of the earth or ground?

A. Yes, I will state that nearest the surface of the earth.

Q. What was its character—did it change as it went down?

A. Towards the bottom?

Q. Yes, sir?

A. The character of the gravel at different places on the gulches or gulch varied. I made the observation that the gravel all might be easily washed. It was not too large.

Q. Will you describe how it changed, if it did change, in its character?

A. There were no two points in any of the gulches that were identical, one with the other. At one point the gravel might be relatively the same and at other points it might change in its composition as to sizes and individual pieces.

Q. Then I take it from your statement that it was not a very uniform bed, is that right?

A. Uniform?

Testimony of L. K. Armstrong.

Q. Yes sir?

A. Fairly so.

Q. Up and down or sidewise, horizontally and in both respects?

A. Well, fairly uniform throughout; varied as those things will.

Q. I thought you said it varied—is that true that you thought it varied?

A. At different points,—it is variable as such gravels are.

Q. Are gravel beds always variable?

A. Variable up and down and sidewise, both ways to some extent, but fairly uniform throughout the mass.

Q. Now what basis have you to indicate to the Court in what respect it was variable, so the Court will understand it?

At some points there was quite large boulders in it. At other points there were fewer of them.

Q. How large boulders were there?

A. The boulders in the gulches sometimes went up to 2 feet in diameter.

Q. You don't know the character of the gravel that was not exposed?

A. I have said, Mr. Avery,—I would like to have asked a question now, I don't know.

Q. It is liable to have varied as it goes into the ground from the exposed point?

A. Some, perhaps.

Q. Well, it is variable, isn't it?

A. Within a reasonable margin.

Testimony of L. K. Armstrong.

Q. Now wherein did the gravel in the bank south of
"P"

the Nespelem that you have marked on exhibit "T",
vary from the gravel on the North bank of the river?

A. It was more uniformly coarse.

Q. How coarse did it get on the South bank?

A. Uniformly it was perhaps larger, the pieces were
not much larger, if any, than those on the North side,
but uniformly the balance of it was coarser.

Q. How big boulders did you find on the south side?

A. I found a few very large ones.

Q. How large?

A. I did not state.

Q. Then I ask you again?

A. Perhaps up to 3 feet in diameter, perhaps.

Q. At what point in the ditch did you find gravel?

A. At a point almost wholly on the Wickman.

Q. Near the Peabody line, north line?

A. Yes, extending westward.

Q. Well, you covered quite a space there Mr. Arm-
strong?

A. Certainly do.

Q. From where "placer" intersects with the north
line of the Peabody?

A. Yes, sir.

Q. Then you examined that in there, I suppose, did
you?

A. I went along it.

Q. Well, I didn't ask you if you went along it. I asked
you if you examined it?

Testimony of L. K. Armstrong.

A. I did.

Q. What do you mean by an examination; when you say you examined it, how did you examine it?

A. I examined it by walking in the ditch and along the side and taking the photographs of it, that is one way as a rule.

Q. You are looking at exhibit "L." Where is the ditch there?

A. On the other side of these boulders. These are boulders here (indicating).

Q. The ditch does not really show on the photograph, does it?

A. The bank of it, yes the bank.

Q. But the ditch itself,—I mean the excavation?

A. Yes the bank.

Q. I say the excavation does not show?

A. It does not.

Q. Now you say that there are some minor exceptions where gravel does not underly in these claims, is that right?

A. I am not certain that I made such a statement. I said with perhaps minor exceptions, I think.

Q. Well, now where were the minor exceptions that you referred to?

A. I noted one.

Q. Where was that?

A. On the Peabody placer.

Q. About where?

A. At about that point (indicating).

Testimony of L. K. Armstrong.

Q. Now you are pointing to the figures "39928" on exhibit No. 4?

A. Well, those figures are probably 100 feet long or more, somewhere along about there.

Q. Well what—wherein did there appear to be a lack of gravel there, could you describe it, Mr. Armstrong?

A. In what way?

Q. Why it could be noted?

A. At the point I have stated there was some clay exposed and evidences of still water depositions.

Q. Well, that was how far from the river?

A. At the water's edge.

Q. At the water's edge?

A. Yes, sir.

Q. Well, when you said that there were minor exceptions or possibly minor exceptions to the fact that gravel underlaid—what do you mean that it lay under—underlaid what—what do you refer to?

A. I think my answer, Mr. Avery, was—it was in answer to a direct question. I do not recall the question.

Mr. BLAIR: Q. What was the question?

A. I don't remember what the question was.

Q. Well, is it a fact that the gravel does not underlie all of the two claims?

A. I don't know that it is.

Q. You don't know whether it does or does not—is that what you mean to say?

A. No. I meant to answer your question. I don't know that it does not underlie it.

Testimony of L. K. Armstrong.

Q. You don't know that it does not underlie, is that right?

A. That it does not underlie it?

Q. Now so we can get together, Mr. Armstrong, does the gravel underlie all of the two placer claims?

A. Does it?

Q. Yes, sir?

A. I could not tell.

Q. You could not tell?

A. No. I want now to enter an exception before you leave this particular subject.

Q. Your examination of the claims was not such as would enable you to state whether or not the gravel underlaid all the claims, was it?

A. It was of a nature—my examination was not of a nature that I could state whether it did or not.

Q. Your examination of the claims was not such as would enable you to state whether or not the gravel underlaid the claims?

A. My examination was of a character which lead me to believe that the greater part of them was underlaid with gravel—of both claims was underlaid with gravel.

Q. But didn't you—did you feel more certain about this on one claim than on the other?

A. No, sir, I did not.

Q. You are equally certain as to each of the claims?

A. I was equally—I believed it to be equally true as to both claims.

Q. Now you stated, I believe, in your direct examina-

Testimony of L. K. Armstrong.

tion that the claims were considerably or much overlaid with sand and light soil, that is right, isn't it?

A. I am not certain I stated that, probably if I said that I would like to alter it.

Q. What is the fact about that?

A. The fact is that it is overlaid largely at greater or less depth.

Q. With sand and light soil?

A. Sand and light soil or silt. Before we get away from this one, I don't want to be misunderstood on this one proposition.

Q. If you want to make any explanation you are at liberty to do so?

A. I want to state specifically that there was a bed of clay lying in the upper end of the Peabody placer.

Q. Where is that?

A. Down here (indicating).

Q. You are pointing at a point between corners one and two on the Peabody, are you not?

A. Approximately, on the north side of the river.

Q. You say that you regard the ground as economically valuable by hydraulicking, isn't that right?

A. Yes, sir.

Q. Referring to both of the claims?

A. Referring to both of the claims.

Q. Do you think that the one is equally as valuable as the other?

A. I have no reason to doubt that they are equally valuable.

Q. Now why do you say they are economically val-

Testimony of L. K. Armstrong.

uable—and may I ask you in this respect what you mean by economically valuable?

A. As placers?

Q. Well, is that what you mean, as placers?

A. Certainly.

Q. Well, as placers?

A. There is a margin of difference between the production and cost, including installation and operation.

Q. Well, is there any particular reason for using the words “economically valuable.” What do you mean when you said “Economically valuable by hydraulicking?”

A. I should perhaps make a little different statement on it. I think—

Q. I will ask you the question. I will ask you—you said, I understood you on your direct examination to say that the claims were economically valuable by hydraulicking. Now I will ask you what you mean by economically valuable, and also what you mean if you said “valuable by hydraulicking” leaving out the “economically?”

A. It would probably have the same meaning.

Q. Then “economically” didn’t limit, did it, or subtract from the answer?

A. Nothing.

Q. You don’t think that it would have to be worked economically in order to be valuable by hydraulicking?

A. I do not.

Q. Will you state the reason for using that expression, using that word?

A. Economically in geology, the term economically

Testimony of L. K. Armstrong.

means in regard to mines whereas the term used generally means any valuable mineral deposit, instead of mines.

Q. Now your reason, I think you gave it, I guess, but will you repeat it if you did,—your reason for arriving at that conclusion?

A. That the property might be worked economically?

Q. Might be economically valuable?

A. By examination.

Q. The water, of course, is an important feature, isn't it?

A. Very.

Q. And the amount of soil to be reduced is a prominent feature?

A. The amount of material.

Q. The amount of material?

A. Yes sir.

Q. The amount of barren material is an important feature isn't it?

A. Yes, sir.

Q. The character of the gravel, does that have any significance?

A. Yes.

Q. What kind of gravel do you estimate can be most economically worked by hydraulicking, without relation to the contents at all, that is, the valuable contents?

A. Valuable contents?

Q. Yes, sir.

A. Large banks or gravel deposits.

Testimony of L. K. Armstrong.

Q. Clean gravel as distinguished from that which contains—

A. I am continuing my answer.

Q. Very well?

A. Large banks or gravel deposits containing no or few boulders of a size which cannot be run through the sluice way and containing little or no cement.

Q. In your deciding that this was a valuable property—what size steel pipe did you think should be worked on it?

A. That would depend entirely on how many giants, whether the water was taken out in one or more and how it would be distributed.

Q. Well when you were figuring on the value of these as a placer proposition, how many giants were you assuming would be used?

A. At least two a good part of the time.

Q. How far apart are they?

A. The giants?

Q. Yes?

A. Might put them on a "Y" probably.

Q. That is, approximately together?

A. Worked in the same bank.

Q. How far apart would they be?

A. They might be 5 or 10 or 15 feet apart for distribution; they might exceed that. The water would be brought down onto the ground in a single pipe.

Q. Now in your estimation of the value of these as placers where would you have the dump? That is one of the most important features, isn't it?

A. In the Columbia River.

Testimony of L. K. Armstrong.

Q. Whereabouts in the Columbia River?

A. At any point most available.

Q. Hadn't you decided on that "any point" when you made the estimation?

A. There was no necessity for it.

Q. No necessity for telling at all?

A. No sir; it didn't require it. It is of minor importance.

Q. What right would you have to dump in the Columbia River?

A. What right?

Q. Yes, sir?

A. There is no law against the right to do it.

Q. You say there is no law against the right to dump in the Columbia River?

A. No law that I was aware of.

Q. How long have you been hydraulic mining?

A. Several years.

Q. And you say you don't know of any law that prevents dumping in a navigable river?

A. That stream is not navigable at that point, I believe.

Q. What do you deem a navigable river?

Mr. BLAIR: I object to this inquiry. It makes no difference whether the witness has or would have a legal right in connection with the dump.

Q. What do you deem a navigable river?

Mr. BLAIR: I object to that as immaterial and irrelevant.

A. A stream upon which navigation is conducted, may

Testimony of L. K. Armstrong.

be conducted, at regular intervals, the year round or at any one particular season.

Q. How many cubic yards would you have to remove, Mr. Armstrong, in order to work these placers?

A. With profit, you mean?

Q. Yes, sir.

A. Why, I could move more than would be necessary.

Q. What is that?

A. I could move more than would be necessary and make it profitable.

Q. I ask you how much you would have to move in order to make the placers profitable?

A. I did not figure on how little or how much, but how much might be done and upon that basis I had figured that it would be profitable.

Q. What would be profitable?

A. Operations.

Q. Well, didn't you figure on how much material you would have to move by hydraulicking?

A. I figured how much I should move, would move.

Q. You would have to go to bedrock, wouldn't you?

A. No sir, I would not.

Q. But in working these by hydraulic process wouldn't you go to bedrock?

A. If bedrock was available I should.

Q. What do you mean, just to understand again, you said "I should go to bedrock," what do you mean by that answer?

A. When I was on the ground the Columbia River was pretty high and I didn't observe bedrock.

Testimony of L. K. Armstrong.

Q. Did you figure in estimating on the value of this property as a hydraulic proposition that they would have to go to bed rock, or would go to bedrock?

A. No, I did not, unless it happened to be there above water level.

Q. How far down did you expect to go?

A. Within a few feet of the water level.

Q. But the nearer the bedrock, isn't that the most valuable material?

A. Not always.

Q. Isn't it generally?

A. The nature of deposits differ widely.

Q. Well, how do they differ?

A. If I wanted to go on I could talk here all the afternoon about the difference, probably—yes, generally.

Q. Isn't it almost universally true that the nearer bedrock you go the richer material you get and the more gold you get?

A. Not universally, no sir. It is generally accepted that it would be unless there are other matters which change it.

Q. Well, you didn't think it was necessary in this case to go to bedrock?

A. I did not.

Q. What is the effect—when you knock gold out of the upper portion of the material where deposit go?

A. It goes down.

Q. In hydraulicking?

A. Goes down.

Testimony of L. K. Armstrong.

Q. Goes down on the bottom of the surface at that point, doesn't it?

A. I don't think that it could be the bottom of the surface—you mean it goes—

Q. It goes down to the surface along at that point?

A. It washes down with the balance of the material.

Q. Well, if you don't go to bedrock what is to hinder this gold from getting in between the larger and coarser pieces of gravel?

A. Oh, to obviate that it is just as well to put your sluices well up to the point of operation.

Q. But the finer gold is liable to be carried off, blown off, washed off, into the coarse gravel at the bottom, isn't it?

A. There are ways of preventing very much loss.

Q. What ways are there?

A. Work in benches, for one.

Q. You think it is economical there?

A. It can be worked economically and not go to bedrock, certainly.

Q. Well, how do you approach a piece of dirt or gravel or land that you are going to hydraulic, or mine by hydraulicking. I wish you would describe it to me as near as you can, Mr. Armstrong?

A. Why, it depends a good deal upon the configuration of the land. I would say, yes. How would I work on these Peabody and Wickman placers? I should operate it off a face of course.

Q. Commence at the bottom do you mean, or off in the river?

Testimony of L. K. Armstrong.

A. Not necessarily,—at the outside.

Q. Where were you figuring on doing this when you made your estimate?

A. I was not figuring on any specific point.

Q. Do you mean to say that you made an estimate of the value of this per yard and did not figure on any specific point?

A. At which I would start operations?

Q. At which you would conduct them?

A. Not at which I should start them,—certainly start at the face somewheres.

Q. Well, where did you decide in making your estimate, where would you commence in this case?

A. No, I think not.

Q. Well, can you tell now where it would be necessary to do it?

A. There would not be any necessity for any special point. There was numbers of places that might be started.

Q. Where, in your estimation, would be the best place to start?

A. I have not figured that out. I know it for a fact that it might be started at a number of different points on the front.

Q. Now give me your best judgment as to the best point to start?

A. Probably a point somewhere near there (indicating).

Q. Corner 4 of the Wickman?

A. Somewhere in that vicinity.

Testimony of L. K. Armstrong.

Q. Then you would be projecting your water against—in what direction, generally,—we will call it projecting it?

A. This is west (indicating)?

Q. That is west.

A. Having cut into the bank I could project it west or east.

Q. That would be in the Columbia River wouldn't it?

A. Westerly or northerly or easterly, I will say different in these places.

Q. Well, you would not mine off the claim?

A. I mean to mine on the claim.

Q. So you would not go westerly would you?

A. Yes, a westerly direction, over here (indicating) after I got in the bank.

Q. Then you would cut the bank down in what state, generally?

A. Oh, I would cut the bank down with the water, I would undercut it probably from different points making one giant cut against the other.

Q. How high above the gravel would this point be in the vicinity of corner four of the Wickman?

A. How high above gravel?

Q. Yes,—when you said you would commence—

A. Is this corner 4 here (indicating)?

Q. No, this (indicating) is corner 4 of the Wickman?

A. How high above it?

Q. Yes?

A. As I recall it the gravel is right—a part of the soil.

Testimony of L. K. Armstrong.

Q. I know, but how high above gravel is the point where you would start?

A. We would expose only the surface.

Q. Now this side (indicating) how would you cut off the bank, in a northerly direction generally—in a general direction northerly or easterly or westerly or north-westerly there?

A. Well, running east we would have to get water down here to the starting point near corner 4 of the Wickman and would bring that down here, a big part of it down this way, bring it over this way (indicating).

Q. Which way were you figuring on bringing it?

A. I didn't figure my point at all, it would be with reference to the best discharge, the best point of discharge, and from there to—

Q. Had't figured on the discharge, the best point of discharge?

A. I didn't figure on the details at all.

Q. And yet you made your estimate on the cost of the plant and the cost of working it per cubic yard?

A. Yes, sir.

Q. Now you would continue to—you would go along, I assume, if I am wrong correct me, and cut right along the gravel, undercut it, is that right?

A. Undercut beyond there and let the bank in.

Q. Then you mean starting there on the surface of the gravel you would cut right in on a level approximately?

A. Level and grade.

Q. Which way?

Testimony of L. K. Armstrong.

A. Level and grade up hill, of course. Then the surface we would leave on there would go off and run up hill some, slightly.

Q. You would continue that until you cleared off the claim above?

A. Not from one point of operation, by no means.

Q. Well, how would you?

A. I, just as I told you, Mr. Avery, according to conditions. If I was going to cut down into two parts and continue that operation of the placer, I should operate that placer at points that I considered was most feasible and most economical and that would easily determine the question—and give more strict attention to those particular points than I have done, if I had been going to answer this question.

Q. Then you cannot give the particular point in respect to the questions I am asking,—you have not gone into the details of that?

A. Not at all.

Q. In the consideration of them?

A. Not at all.

Q. Well, then, are you able to tell me how you would take off this portion of the Wickman that is north or northwest of the point that you said you would originally start from?

A. Am I unable to tell you that, tell you how I would cut it,—no I am not unable to. I can tell you.

Q. You are able to then?

A. Yes I am able to tell you.

Testimony of L. K. Armstrong.

Q. I want to know the way you would do it as being the most feasible?

A. There are three points. I should probably have to investigate the ground again to give you that information.

Q. You don't know then?

A. I told you here that I didn't

Q. Then your estimate was made without knowing the most economical ways of working that claim?

A. My estimate was made knowing that I could work the claim economically from either one of three different points, two or three different points.

Q. But you don't know which would be the most economical, is that right?

A. Your question is one that is difficult to answer for the reason that I should not place my pipe at the same point all the time.

Q. Well, for how far would you have it, being down along on this bank of the Wickman—

A. On the Wickman?

Q. Now how long would you have your giant there working up north and northeast?

A. Until I cleaned the gravel off.

Q. All the gravel north?

A. At a point most economical and then I would move it to a different point, at some different place along up there.

Q. Let's take the grade on this point we have here. You are on the level dirt there and you would hydraulic

Testimony of L. K. Armstrong.

on an up grade up here, well, north of that point, is that right?

A. At that point?

Q. Yes?

A. Probably not.

Q. Well, how long would you stay there?

A. I would stay there just as long as I could work more economically from that point than from any other.

Q. How long could you economically work it from that point,—can you tell now?

A. No, I cannot tell.

Q. Cannot tell anything about it?

A. No.

Q. What would govern you in deciding that question?

A. The operation.

Q. You mean the result of the operation?

A. Yes, sir.

Q. Well, let's be a little more definite than that. What particular feature of the operation?

A. The effectiveness of the water on the bank.

Q. How far would you have to throw the water?

A. I would not want to throw it far. Well, probably not—

Q. Well, how far would you have to throw it in order to do it as fast as you want to do it or to do it in the way you think it ought to be done?

A. I could very readily throw it a hundred feet or more.

Q. Then I understand you to say you are unable to tell at this time whether or not you would continue to

Testimony of L. K. Armstrong.

clear off from the point north of approximately corner 4 after changing your giant?

A. Continuing north?

Q. Yes, north and northeast?

A. How far?

Q. Up to the end of the claim?

A. I certainly should not. I am able to tell you that?

Q. Are there any conditions that would—that could exist that would permit you to clear right on up, after you had commenced here (indicating) and keep on clear up north of you, to the northeast?

A. It might be more desirous to throw somewhere else nearer.

Q. Now how deep is the gravel at that point, do you know?

A. I don't know.

Q. I refer to corner four?

A. Yes, the bank here (indicating).

Q. Yes sir, how deep is the gravel itself?

A. The point I speak of I should estimate it to be at least 25 feet.

Q. Well now let's see—we will go up here as far as we can on this land, then you have cleared off practically down to the gravel?

A. I didn't mention down to the gravel.

Q. What do you mean then—how do you mean?

A. I cleared the gravel down to a certain level at which I was working it.

Testimony of L. K. Armstrong.

Q. Well, you would be then after you had cleared it down at least or approximately 25 feet above bedrock?

A. I would be?

Q. Wouldn't you?

A. By what deduction?

Q. By the deduction that you said the gravel was there 25 feet deep?

A. I didn't say that there was any bedrock.

Q. Well, I will change that if you wish. Then you would still be 25 feet above the bottom of the gravel?

A. I might be.

Q. Well isn't that the most logical deduction, that you would be?

A. I cannot understand what that statement is based upon, Perhaps you can make a question that I can answer a little easier.

Q. Well, at the point where you have got your giant you said that the gravel was there 25 feet deep, didn't you?

A. Approximately.

Q. Now we have cleared to the north, in our imaginary operations, down to the top of the gravel, or at least to the level that you are on, with your giant inclining up hill. Now isn't it a fact that that incline commenced with the point on which you were using your giant, and below that there would be about 25 feet of gravel probably, in depth, a gravel depth of 25 feet?

A. I think we are at cross purposes. I didn't mean to be understood that there was 25 feet of gravel below my operations.

Testimony of L. K. Armstrong.

Q. I understood you to answer that.

A. I don't know—the question that was asked—

Q. How deep is the gravel at that point?

A. I said approximately 25 feet as far as I could see.

Q. That is what I thought you said.

A. But that is the face, not the bedrock, not below my operations.

Q. How deep, how much gravel was there below the point where you suggested starting?

A. I don't know.

Q. When you said that that would be a good place to start your operations, did you have in mind how deep the gravel was along there?

A. I had a general idea.

Q. What was your general idea as to that?

A. My general idea was—my idea was that the bench was made up almost wholly of gravel except at specific points.

Q. Well now will you tell me if you had an idea how deep the gravel was at that point of operation—did you have an idea how deep the gravel was at that point?

A. No, I did not.

Q. You did not?

A. No.

Q. Would it make any difference in your estimation if you did know?

A. Of profit?

Q. Yes, well anything?

A. Cost of operation, etc.?

Q. Yes, sir.

Testimony of L. K. Armstrong.

A. If I did know?

Q. Yes?

A. Not in that particular operation.

Q. All right, we will say that it went down 25 feet. That would not make any difference, would it?

A. The bank?

Q. It would not make any difference in your system of operation, I understood you to say what the depth was there, if that would be the theory, I am calling it 25 feet, is that satisfactory?

A. At that point—

Q. Then now we have attempted to clear up here, in an imaginary way, and a plain having been knocked off or scraped down to the level, leaving the plain inclined up, it inclines up, does it?

A. Yes, sir.

Q. Now, after you have got that planed off to the edge of—after that plain is washed off extending to the limits of the claim, then what would you do next?

A. To the limit of what?

Q. The limit of the claim, after you have swept the claim off?

A. Change my operations to another point.

Q. Where would you change it to next?

A. To be determined entirely on conditions, propositions which might develop by that other operation.

Q. What are the facts that you would look upon as being decisive or a criterion?

A. I might decide—I might be decided by the discovery of bedrock.

Testimony of L. K. Armstrong.

Q. Would you expect to find bedrock in that operation as above pictured?

A. I might find it.

Q. Well, it would have gotten up there within the 25 feet, wouldn't it?

A. We started at 25 feet and we are now going back into the hill.

Q. Well, when you arrived there, you are unable to say, I take it, from your present knowledge of the claim, what you would do next, is that right?

A. I am, yes sir.

Q. You would simply change your base of operation—what would become of the stuff that you knocked off?

A. From the hill, you mean?

Q. Yes, sir?

A. In the Columbia river.

Q. How would it go off?

A. Through sluices.

Q. That is, a sluice is a box through which water runs?

A. Yes, sir.

Q. What is the size of the boxes?

A. Depends entirely on circumstances.

Q. What do you think is the proper size on these claims?

A. On this property?

Q. Yes?

A. Depends entirely on the equipment how big the sluice boxes I would use—sufficient water to pass

Testimony of L. K. Armstrong.

through, sufficient to cover the debris as it passes through, and the boulders, sluices I would say.

Q. And it would spout over into the river at the bottom would it, is that the way it goes over?

A. It would go into the river.

Q. What would happen to the fine particles of gold that are more or less blown about by the force of the water.

A. They would settle.

Q. Settle in the sluice boxes at the bottom of the gravel?

A. Yes, sir.

Q. Well, this large mass of water down there all goes over the sluice box does it?

A. Pretty much all of it, yes.

Q. Do you know what the usual waste is in hydraulic mining?

A. Don't exceed 5 per cent.

Q. That has been your experience has it?

A. That has been my experience,—sometimes much less.

Q. Never more?

A. If it did it would be a waste.

Q. It could not be any more?

A. Should not be any more.

Q. Well, you have a series of sluice boxes in connection with the face of the drift that you are cutting against, I believe you call that a drift, you know what I mean?

A. Yes, along the face,—it is below it.

Testimony of L. K. Armstrong.

Q. It is below?

A. Yes.

Q. Well, does all the dirt that falls fall in the sluice boxes?

A. It doesn't fall in, it goes through it.

Q. How does it get in the sluice boxes?

A. The water carries it there.

Q. Well, you have got to use—I have forgotten what you said it was—that term—that means that you cut in the bank at the bottom so that it will undermine it, and it will fall down, that that right?

A. Yes, sir.

Q. Where does it fall?

A. Falls in the raceway.

Q. What is the raceway?

A. It is the area of ground above the sluice boxes that has been washed over.

Q. Well then does it go through the raceway into the sluice boxes?

A. It does.

Q. Is the sluice box at the end of the raceway?

A. I don't know what you term the end.

Q. Well, has it an end?

A. It has an outside limit.

Q. What is the size of the raceway?

A. Depends entirely on the conditions and circumstances.

Q. I mean the raceway you would use on these claims—what would be its dimensions?

A. I don't know.

Testimony of L. K. Armstrong.

Q. Haven't figured on that?

A. No, depends on the height of the bank.

Q. You might find conditions there that would alter your estimate, might you not, Mr. Armstrong?

A. Highly improbable.

Q. Let's go back. We wash a streak clean, a space clean, a space up above, up to the north, inclined up to the north, inclined north up the bar, about how much of an incline on that particular work that we are hydraulicking?

A. That would be governed entirely by circumstances, Mr. Avery. I cannot tell the grade of the sluice boxes, I should be governed entirely by conditions there, which might vary, things to vary the sluice boxes.

Q. How would you then work—much of the dirt, much of the fine particles of gold would go down on the gravel plain that we have worked out, wouldn't it?

A. You are going to take care of part of the gold.

Q. How would you do it?

A. Two ways.

Q. Which way would you do it here?

A. I should make, in the first place, my raceway very short and small, that is one way.

Q. Why would you do that?

A. In order that the gold would not travel around over the territory before arriving at the sluice boxes.

Q. How long would you think it should be made?

A. Which, the raceway?

Q. Yes?

Testimony of L. K. Armstrong.

A. Oh, I could not tell you exactly, it would be governed entirely by local conditions.

Q. What?

A. If I am cutting 100 feet deep you would have to have the raceway much longer than you would for twenty-five feet deep—at different points of depth and varying elevations, you cannot tell.

Q. It all has something to do with the question of economical work there doesn't it?

A. To a man that understands his business the cost don't vary. It is just a matter of knowing, that is all.

Q. Don't experts generally spend more of an effort in examining a claim than you did this one before giving an opinion as to its possibilities for hydraulic mining?

A. In some cases they spend less. I could cite one.

Q. Now how would you secure this 25 feet of gravel that we were on top of. You cut another area as I understand it?

A. You cut another area—my understanding was that in the previous question the 25 feet of gravel had reference only to the gravel in the face that I was telling you about,—it was not how much gravel was exposed beyond.

Q. Let us take it, then, as illustrating,—you said it didn't make any difference, the depth of bedrock—as illustrative we take the depth or supposed depth of 25 feet along the place where we were working or below the place where we were working?

Testimony of L. K. Armstrong.

A. I don't know that we assumed that. I did not so understand it.

Q. Well, how would you get that off—how would you secure it or the gold in it?

A. The lower part?

Q. Yes, below it?

A. If I operated as we have suggested, which I might not do, I should start in as before and cut it down.

Q. Where would you cut from then?

A. Cut from a point on the river, at the Nespeelm down in this point (indicating) approximately there.

Q. Down near corners four and five of the Peabody?

A. In that vicinity.

Q. Then you would have coarser) gravel wouldn't you to the East of it?

A. I might have.

Q. And you would take off that 25 feet of ground in the same way that you took off the first?

A. Practically the same way.

Q. What did you say?

A. Practically the same way.

Q. How far back would you go with it?

A. I should—

Q. To the end of the claim?

A. I should have to modify my statement there by stating that I had no idea that the gravel is any coarser at that point than it was higher up.

Q. Gravel grows coarser as it goes down, doesn't it?

A. Depends entirely on circumstances.

Q. Is that not unusual?

Testimony of L. K. Armstrong.

Mr. BLAIR: I object to that as immaterial.

A. In as much as gravel is not laid down at the same time it might or might not be a fact.

Q. Then you say it is not so?

A. I didn't say so.

Q. Didn't say so?

A. I said in as much as the gravel is not laid down at the same time the gravel in the last 25 feet may have no relation whatever to the upper layer of gravel that we have washed.

Q. Then you are not saying whether gravel usually gets coarser as it goes down?

A. No, in as much as it might or might not.

Q. Well, Mr. Armstrong, do I understand you to say you would go through the same process back up to the bank, up to the northern part of the claim again?

A. I didn't say so, Mr. Avery. In fact, I wish to object as I didn't say I would go through this same operation and I wish to object to it.

Q. How far do you want to be carried up—to the top of the claim?

A. I would be governed entirely by circumstances on the ground. The method of operation is one which no man can tell until he is there and sees the character of the gravel and the way you would move the gravel is governed by the way you would handle it with water. I would outline a plan as I went along that would be adapted to my process, but my figures have been amply high in the estimation of cost.

Q. Do you say it makes any difference whether you

Testimony of L. K. Armstrong.

are cutting way up to the top of the claim or part of the way or whether you are on bedrock or not?

A. Decidedly it makes a difference in operation whether I am on bedrock or not.

Q. Yes?

A. I could probably reduce that figure a little if I was on bedrock.

Q. If there was gravel still existing above bedrock you would still think it would be a profitable method of mining?

A. Most decidedly so.

Q. Has your mining been largely or to any degree above bedrock?

A. I have mined above bedrock.

Q. Has it been largely or to any considerable degree above bedrock?

A. I have operated several seasons above bedrock.

Q. How many seasons?

A. At least three.

Q. How many years have you been hydraulic mining?

A. Hydraulic mining?

Q. You have stated once but I have forgotten what is it?

A. I will approximate it about ten.

Q. Where did you work this claim above bedrock?

A. On the Swauk,—that is one place.

Q. Where is the other place?

A. We worked some part of the ground in Southern Oregon, part of it above bedrock.

Q. How much above bedrock?

Testimony of L. K. Armstrong.

A. Oh, several feet—20.

Q. What kind of bedrock was it?

A. Bedrock there—there was some granite.

Q. Now, Mr. Armstrong, take this supposition of commencing down here—I think you started to tell how you would get the water to that point near corner four of the Wickman?

A. How I should get it there?

Q. Yes,—by steel pipe?

A. Yes.

Q. I assume you put it there by pipe?

A. You would have a waste pipe or carry it down in an open ditch—this ditch here.

Q. Do you mean by that that you would carry it along the North line of the claim and around north of the point of operation?

A. Practically.

Q. How would you take it from there to the giant?

A. By steel pipe.

Q. Steel pipe?

A. Yes, sir.

Q. Then this steel pipe was to go to the giant from that point?

A. Yes, you understand this is a high-line ditch.

Q. What do you mean?

A. It is a high-line ditch to take the water from the dam, on this level shown on this photograph here is a high-line ditch level.

Q. You are referring now to exhibit "I"?

A. Yes sir. I would carry that around the bluff.

Testimony of L. K. Armstrong.

Q. Can you indicate approximately on exhibit 4 where this ditch would be, reaching around the bluff?

A. I suppose about 6,000 feet from the point of intake.

Q. Do you mean it would be practically along the north line of the claim?

A. Above that.

Q. Above the claim, would it?

A. Yes, above it.

Q. It would be outside the limits of the claim?

A. Oh, yes.

Q. Did you say something about using the waste water?

A. Yes, sir.

Q. That ditch then you would use for waste water?

A. Yes, that ditch.

Q. Now will you explain, Mr. Armstrong, how you do that, how you use that ditch for waste water?

A. Why, connect it at points where not connected with the flume and such water as I do not want for placer operations I should put into the waste water ditch and take it around to a point where I could use it for running into the sluices.

Q. Then you do not depend entirely upon the steel pipe water for the water that goes through the sluices?

A. No.

Q. Now, Mr. Armstrong, we had quite a little discussion about the amount of material north of corner 4 of the Wickman. Now in the operation of this mine

Testimony of L. K. Armstrong.

as you contemplated when you made your estimate where would you put your giant or machine?

A. I should be governed by conditions entirely.

Q. Entirely?

A. Yes sir—that would develop and had already developed.

Q. That would develop and which are already developed?

A. Which might develop and which are already developed.

Q. Which are those that are already developed?

A. Those that are already developed would be conditions which would permit of the best disposal of the tailings and the shortest length of pipe.

Q. What are those conditions which are not developed now?

A. They would be the conditions of bedrock or stratification or other things perhaps.

Q. Well now you have named bedrock and stratification. In what respect would bedrock or stratification influence you in mining the claim by hydraulic process?

A. Bedrock would depend entirely on its occurrence.

Q. What do you mean by occurrence?

A. I said occurrence.

Q. You spoke about stratification?

A. As to stratification,—I mean by that that it would depend partially—possibly—on the character of the gravel in the bank below it.

Q. This stratification—is that an important element in the consideration of this question?

Testimony of L. K. Armstrong.

A. It might reduce the cost of operation.

Q. Might it increase the cost of operation?

A. Possibly, not probably.

Q. Would the bedrock increase the cost of operation it?

A. It would not increase it?

Q. Wherein would stratification influence the cost?

A. There is a possibility of the gravel being uniform all the way up and down.

Q. In what respect does uniformity of gravel influence the cost?

A. Oh, there is some influence on it—it has some influence.

Q. In a great degree?

A. Depends entirely on circumstances. I don't imagine that the ground would be influenced as to cost materially by what might be uncovered except as to bedrock.

Q. All right now, we will cancel stratification?

A. All right.

Q. Wherein does bedrock influence the cost of production?

A. It might reduce it. I will not say that it would.

Q. It might reduce it?

A. It might.

Q. In what respect would it reduce it—how would it affect it?

A. It might lay at an angle or it might be of a character that we could have more sluiceway—sluiceways.

Q. Wherein does angle affect it?

A. That would be the pitch.

Testimony of L. K. Armstrong.

Q. The pitch—I understood you to say angle, so I said angle?

A. Well, if it pitched directly to the work it would reduce the cost materially?

Q. Why?

A. Because it would facilitate the movement of the gravel.

Q. Then would it make a great deal of difference between the conditions if you did not find any bedrock and as if you found bedrock as you have last described?

A. If I should find it as last described it might reduce the cost somewhat, probably would reduce the cost somewhat.

Q. Somewhat?

A. Yes, sir.

Q. Is that a material feature in the operation?

A. No, not material. I have not based my estimate upon finding bedrock.

Q. Then we can cancel bedrock—cancel that from what you said?

A. All right, let's do.

Q. Well now assuming that you know what you do know now in connection with the claims from observation, with your known facilities for dumping, etc., where would you next commence to operate?

A. With what I do know now, you mean?

Q. Yes, sir?

A. Well as I say it would depend on the area that we would have removed—will depend upon the area that

Testimony of L. K. Armstrong.

we remove, upon that would depend the future operations and the point of future operations.

Q. The only things that you did not know were stratification and bedrock and we have practically disposed of them and I thought now we could find out about how you would next commence to work?

A. I could work all these places on the claims.

Q. Where would you next set your giant?

A. There is no answering the question you ask. I cannot answer it until I get on and clear off, just exactly.

Q. Can you tell approximately,—I don't mean within a yard?

A. I cannot tell where I should set the giant at all until I see the ground. I might want to take the water out of another point and might not. It would depend entirely on where we would operate the giant.

Q. I thought there was nothing but stratification and bedrock that would influence your decision as to that?

A. As to where I should operate?

Q. Then you don't know how you would commence to knock off the rest of the dirt, is that right?

A. No, I do not, of course, know just exactly at what point I should start.

Q. You have not figured on the amount of dirt you would have to remove, have you?

A. From what point?

Q. From the whole claim, all that was workable as placer?

A. There are several years operation there with all the water that is available. That is sufficient.

Testimony of L. K. Armstrong.

Q. But you don't know how much it is in cubic yards?

A. Well, I could not arrive at an estimate,—I have not estimated it. A good many million cubic yards.

Q. How could you estimate it when you don't know where bedrock is?

A. I am estimating everything above the river.

Q. Estimating above the river?

A. I am estimating above the river at that side and an equal depth on the other side.

Q. How far up in the panhandle does your estimate include?

A. At a point where the Peabody makes a turn above the cabin.

Q. Well, by looking at exhibit 4 can you tell?

A. I think likely along there I should say (indicating).

Q. Now you have put your finger on there immediately on their immediately under the "h" in the words "Improvement 3 ditch" on the Peabody?

A. Approximately at that point.

Q. And the rest of the panhandle is not workable I assume as a mine, is it?

A. As placer?

Q. I meant to say that?

A. I will confess to not knowing.

Q. You made no examination of that?

A. Never with a view of working it as placer, that is for gold.

At this point the hearing was adjourned until 10 o'clock A. M. July 23rd, 1909.

Spokane, Wash., July 23rd, 1909. 10 o'clock A. M.

Testimony of L. K. Armstrong.

Hearing continued pursuant to adjournment. All parties being present.

L. K. ARMSTRONG, recalled for further examination.

CROSS EXAMINATION, Cont'd.

By Mr. AVERY:

Q. You say that you use giants at the end of this steel pipe?

A. We do.

Q. Well a giant is really an abbreviation of a former name giant nozzle, isn't it—an abbreviation of a former name—isn't a giant simply a large nozzle?

A. Well, a nozzle, Mr. Avery, is only a part of a giant—might consider it so perhaps. However, in hydraulic engineering and mining a nozzle is a distinct part of a giant.

Q. What is the nozzle of a giant?

A. The nozzle is the machinery at the point of ejection.

Q. The machinery?

A. The appliance, we will call it.

Q. State the nature or describe the appliance or machinery at the point of ejection?

A. It is a circular—a tubular metal having a circular orifice inside.

Q. It is just a hole, isn't it?

A. A hole is a hole, but this to cover the hole.

Q. What?

A. It is the metal which surrounds the hole, as you call it.

Q. Then is it any different in its general characteris-

Testimony of L. K. Armstrong.

ties from the nozzle that we use to sprinkle lawns—in its general characteristics and features?

A. Broadly you may say similar.

Q. Now what is a giant?

A. The part to which the nozzle is held.

Q. Will you describe that?

A. It is attached to the end of the pipe and serves as a controller of the water—a controller and a reducer—controller of the water and reducer, I might call it, of the superficial area.

Q. Well then in its general characteristics and features it is not very much different from the part, the brass part that is back of the nozzle of a hose for lawn watering, is it?

A. Broadly—

(Question read).

A. The purpose it answers is the same practically, that is, to reduce the diameter of the pipe and give it greater force, to give the water greater force.

Q. In other words the giant reduces the size of the stream and consequently increases the force from the in the pipe to that in the aperture where it is ejected, just the same as in a lawn sprinkler?

A. Yes, sir.

Q. And do you not recall that the original name of the nozzle as a whole as distinguished from the aperature that last feels the water, was a giant nozzle?

A. The original name?

Q. Yes, sir.

A. The name first originated in different forms, that

Testimony of L. K. Armstrong.

is, the names have originated by different manufacturers at different times and different places and the generally accepted name for the machinery and appliance which I have attempted to describe roughly, is a giant.

Q. You don't know that they were formerly called giant nozzles, and they just dropped the "nozzle"?

A. I don't know that they were then called "giant" at all. Might have been called something else.

Q. But what you don't know?

A. It is simply a term which manufacturers have used, the generally accepted name of the machinery and appliance which I have attempted to describe is at the present time "a giant," and has been for some years.

Q. But you don't know what it was called prior to that?

A. It was called half a dozen different names by different manufacturers.

Q. What were they, do you know?

A. I will have to call to mind—it might have been called a half a dozen different names, different names used by different manufacturers, a name by which they could identify those of their manufacture from others, one of them was a monitor.

Q. Anyway you cannot recall?

A. Oh, I don't recall just this instant.—I know there were other names.

Q. Now in speaking of the cost of perfecting this hydraulicking plant up there, one of the items you mentioned was a flume around the foot of the hill 6,000 feet

Testimony of L. K. Armstrong.

to carry 3,000 to 5,000 inches of water. Now at how much did you figure that?

A. Around the face of the hill,—not along the foot.

Q. I have it down here foot. Don't you think you said foot possibly, or the face—it is immaterial, but I think you said foot, but if you say front, why it is the same thing?

A. I meant if I said foot, I meant front.

Q. That is what the word would suggest to myself. Now how much did you estimate that would cost?

A. The flume?

Q. Yes, sir?

A. I did, I estimated the cost, I think.

Q. Well don't you know what you estimated the cost to be?

A. No, but I can tell you roughly. Including material, the building of the trestle, labor,—I don't recall the estimate, but I will make a statement as to the estimate.

Q. Well, did you make an estimate?

A. Did I make an estimate?

Q. Yes?

A. I certainly made an estimate—possibly made an estimate.

Q. But you don't recall now what it was?

A. In part—I don't recall any specific part of it. I recall the whole as I worked it out, the whole of it. That was something in excess of \$50,000.00. I don't believe I would care to commit myself on that just now because I would have to get my old figures if I

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did. I will make this statement, that my statement as to cost, my figuring on the cost and the statement based on it was based on each separate item and figured out.

Q. Well, then, I will ask you how much it would cost to put the flume around the foot of the hill, 6,000 feet, to carry 3,000 to 5,000 inches of water?

A. Front of the hill, you mean?

Q. Front of the hill, yes?

A. It would form a considerable part of the total figures gives in the estimate here.

Q. How great a part?

A. A considerable part.

Q. How great a part?

A. Not less than 40 per cent.

Q. That is the flume, isn't it?

A. That is the flume around the face of the hill, not the foot of the hill as you stated.

Q. Around the front of the hill?

A. Around the front of the hill.

Q. How much did you figure that flume to be?

A. Depends on the grade. My figures were probably low. Probably that would have to be raised if we should change the grade. It depends on the amount of water we should want to put through.

Q. What grade did you figure on?

A. Two or three figures, either one of which might have to be changed—four feet by six, you could do it with 70 feet of lumber a lineal foot, that is the basis I figured on for the flume, 70 feet of lumber for a lineal foot without figuring on the trestle at all.

Testimony of L. K. Armstrong.

Q. Did you say something about bridge work in connection with that?

A. I did.

Q. What is that, you mean the trestle, I suppose?

A. Yes, sir.

Q. How much would the trestle and the bridge work cost?

A. I didn't figure. That is not in my estimate except in a rough way. I figured that the bridge work and the trestles would cost at least 25 per cent of the cost of the flume, meaning outside of the cost.

Q. Well, didn't you figure on the bridge work and the trestles in your estimate of \$50,000.00?

A. No, it would go over that with it.

Q. You didn't mean to include that in your estimate then?

A. My figures were low, as a matter of fact, for that, I am quite well satisfied, not sufficient.

Q. Well, your statement as I understood it included the flume, if I am mistaken I just want to correct myself, that is all?

A. I do.

Q. You didn't include it?

A. I did include it in this way that I have just stated. I included the whole cost then,—I am not certain it would take to build the flume what I stated,—\$50,000.00.

Q. Then \$50,000.00 was not necessarily an accurate estimate?

A. Not at all. I estimated that as the minimum.

Testimony of L. K. Armstrong.

Q. How much did you estimate the pressure boxes at suitable points would cost?

A. Pressure boxes don't carry very much lumber. The question of suitable points would be determined as I stated yesterday in the delivery of the water, which would be at intervals along the front of the hill.

Q. Weren't they included in the estimate?

A. Yes, sir.

Q. How many pressure boxes would there be?

A. Oh, not to exceed six.

Q. What are they for, Mr. Armstrong?

A. Simply to accumulate a uniform—enough water to make a uniform pressure,—don't need to be large—to exclude the sand,—or sand boxes I should advise for excluding the sand from the pipe.

Q. How much do you figure the construction of a ditch at the lower level which with the flume to convey placer water or sluicing water—?

A. The construction of a ditch?

Q. How much did you figure the ditch?

A. This is practically the figure. I didn't figure any cost whatever in completing the ditch on there, the completion of it, the intervals between, by the erection of a flume.

Q. That was included?

A. That was included, yes sir.

Q. How much did you figure it would cost to complete the ditch?

A. I didn't figure on it separate at all as I stated. I did figure it separately but not the total. I have for-

Testimony of L. K. Armstrong.

gotten what I made that including the lumber and cost of labor. The cost of labor would be about 60 per cent I suppose of the cost and the lumber would cost \$10 per M.,—not less than \$5.00.

Q. Are you able to say at this time how much you estimated the completion of the ditch to be?

A. Under a separate item?

Q. Yes, sir.

A. I am not.

Q. What do you mean to include by the expression, in substance, "with equipment consisting of pipes," I think I have it, I may be wrong about that—is that right, Mr. Armstrong?

A. You are figuring on the lumber bill are you now?

Q. I have it down in addition, you said "for equipment." What equipment did you refer to?

A. I referred to the equipment of the placers by—pipe would be included.

Q. Well, was that included in the cost of the flume?

A. Yes, included in the total cost.

Q. Well, just tell me the different items which you referred to as equipment?

A. The pipe and giant and standpipe.

Q. The equipment was the giant?

A. I didn't say—but the pipe is a giant—the pipe and giant—the standpipe and air escape and flumes or sluices I would say—sluices.

Q. Anything else that you recall?

A. As equipment?

Q. Yes?

Testimony of L. K. Armstrong.

A. Well, there would be the material that would go with the sluices.

Q. You mean by that the wood part?

A. Yes, wooden material and the different riffles.

Q. And what pipe did you refer to when you commenced the list—the steel pipe?

A. Yes, on the steel pipe.

Q. How much did you figure that would cost?

A. That would depend—the cost would be about \$2.50 to \$4.00 per foot delivered on the ground and put in place.

Q. \$2.50 to \$4.00?

A. Yes, a foot.

Q. How much did you figure the total of that?

A. The pipe?

Q. Yes, sir.

A. I don't recall the exact figure on that.

Q. Did you figure that you would have \$2.50 or \$4.00 pipe?

A. Well, I figured I would have both—the price of pipe varies from \$2.50 up to a very high price. You cannot tell about what price the pipe is going to be until you get it, so I figured what I would consider safe.

Q. How many feet of pipe would it take?

A. Take more than a thousand feet—probably three thousand—possibly more.

Q. Did you figure on one, two or three thousand feet?

A. I don't recall exactly what I figured on, but I considered I figured on three thousand feet, possibly more, as I stated.

Testimony of L. K. Armstrong.

Q. You don't know how much then you did estimate that would cost in this plant?

A. You could put the minimum length of pipe at 3,000 feet and the absolute cost about \$2.50 a foot—above that.

Q. The minimum pipe 3,000 feet and the cost, the minimum cost at \$2.50?

A. I said above \$2.50.

Q. Well the minimum cost a foot was above \$2.50?

A. I didn't exactly put it that way.

Q. When you said gates in making this estimate, what gates did you refer to Mr. Armstrong?

A. There would be a gate at any "Y" that might be made—there would be a gate.

Q. Would that be any expense?

A. Oh, yes.

Q. How much would that be?

A. I should estimate those at not less than \$150 apiece.

Q. And how many?

A. Not less than two.

Q. And standpipe, how much would that cost and how many are there of them?

A. Well, there would be one at least.

Q. How much?

A. Cost above \$300.00.

Q. How much?

A. I will make that at \$300.00.

Q. How much does a giant cost?

Testimony of L. K. Armstrong.

A. I don't believe I figured on a giant separately. I have forgotten now just what they do cost.

Q. How many of those would you have?

A. Not less than two.

Q. You don't know the cost?

A. I have forgotten now. I have been told that several times but it has slipped my memory.

Q. Do you happen to know approximately what they cost?

A. I would not want to say just now.

Q. Now do you know what the air escapes would cost?

A. Why the air escapes we want could be put in at a cost of \$25.00 apiece.

Q. And how many?

A. Not less than two or three—say five.

Q. And sluices, how much would they cost?

A. In excess of a thousand dollars.

Q. How many would that be?

A. Well, that I figured—I figured that I could use up to 30 or 40.

Q. That is, are they lineal running one after the other, or in different places?

A. Well in conducting it they might be run double and they might be run singly and might be run as separates. There is a great waste of lumber in the construction of that sort of thing.

Q. What size would the boxes be, Mr. Armstrong?

A. That would depend entirely on how they were laid. I would figure the cost per lineal foot for flumes

Testimony of L. K. Armstrong.

—I would say sluices, for sluiceways, equal per lineal foot, that is 70 feet, to the flumes.

Q. I don't know as I understand you and I wish you would enlighten me a little more. How many feet, lineal feet of sluice boxes do you think there would be in this number of 30 or 40?

A. They would be about 12 feet long apiece.

Q. Now how much did you figure the lighting plant would cost?

A. That would be auxiliary and of course the saw mill and whatever purpose the power might be put to, that I am figuring on—I have forgotten. I figured it out by different exact items.

Q. You have forgotten what the lighting plant would cost?

A. I have forgotten just what it would cost. I should say it would cost—I should make an estimate—make an estimate on a lighting plant that would cost \$500.00.

Q. Why did you mention a lighting plant. What was the purpose of the lighting plant?

A. Why, for night work.

Q. The object of the lighting plant is to throw light on the place where you are working the giant?

A. Yes, sir.

Q. The light is directed by search light or by means of incandescent lights?

A. Run both ways—open arc lights are very frequently used.

Q. Did you use open arc lights down on Swauk mountain?

Testimony of L. K. Armstrong.

A. I used a headlight—a locomotive headlight and also open fires.

Q. Open fires?

A. Open fires, yes—both ways. I have used them on the ground.

Q. The locomotive headlight would be filled with oil?

A. Yes, sir.

Q. What did you use down in Oregon—what did you use there?

A. In the Oregon diggings we used a locomotive headlight there and we had also reflector lanterns at that place.

Q. Are there any hydraulic diggings up in the Nespelem country?

A. I regard this—the Nespelem country is a pretty broad question. If you mean directly at that point—it is the only property that I went to examine. I have no knowledge, no personal knowledge of any other hydraulic propositions at that point.

Q. Well, how far do you consider the Nespelem country runs? Don't you have any opinion as to that?

A. Yes, I have got an idea about the Nespelem country.

Q. According to your idea is there any other hydraulic diggings in the Nespelem country proper?

A. No, I generally regarded the opposite side of the river and near—below the gulch which I have shown on this map exhibit “T” to the West,—I refer only to the North side—the North side of the Columbia river, on

Testimony of L. K. Armstrong.

the Reservation side of the Columbia river and in behind, above the gulch to the West of the Wickman.

Q. Where is the nearest hydraulicking plant to these placers?

A. I don't know.

Q. Where is the nearest one that you know of?

A. I don't know of any in the immediate vicinity.

Q. Where is the nearest one that you know of?

A. I have knowledge through the Treasury Department, the Mint Bureau of the Treasury Department as to the operations and production of gold along the Columbia.

Mr. AVERY: I object, and move to strike the answer.

A. My knowledge is based upon official reports.

Q. I have not asked what your knowledge was. I asked another question.

(Question read).

A. A knowledge may be acquired by personal investigation or by official report. Official reports from the Mint Bureau are to the effect that hydraulicking operations—

Mr. AVERY: I object. I just want to know, if you know, the nearest hydraulicking plant of which you have knowledge. I mean when I say "nearest", nearest to these placer claims?

A. I would like a little more accurate definition of my own knowledge, whether I must consider—whether from a personal examination or from official report?

Q. Well, all right—either one—I will put it this way,

Testimony of L. K. Armstrong.

—which is the nearest one to these claims that you know of personally?

A. Personally I do not know of any hydraulicking operations on the Columbia river at this time South of the boundary line.

Q. Well, now, do you mean by that to answer my question that you do not know of anything any nearer than those in British Columbia?

A. I answered that I don't know of any south of the British Columbia line.

Q. Well, that is what you mean?

A. Personally—I have no personal knowledge.

Q. Now let's get an answer to the question. Where is the nearest plant that you of your own personal knowledge know of the existence of?

A. Do you mean hydraulic plant?

Q. That is what I mean?

A. You mean any claim?

Q. I mean anywheres in any direction from these claims?

Mr. BLAIR: I object to the question as immaterial.

A. Do you ask for personal knowledge or a combination of personal and official?

Mr. AVERY: I am not going to repeat the question.

Mr. BLAIR: You rather divided it.

Mr. AVERY: I still adhere to the last question when I said I want to find out what you personally know of.

A. I have no knowledge—you want to know how far—was that the question?

Q. How far and where it is?

Testimony of L. K. Armstrong.

A. I cannot answer the question.

Q. In figuring on the estimated cost of the electric light plant, would that plant be used for any other purpose?

A. Electric plant?

Q. Could it be?

A. It could—should.

Q. Which?

A. Should have it for other purposes, sawing lumber.

Q. And giving energy—distributing energy and power to outside points?

A. I have no knowledge of any such a thing,—purely speculative.

Q. Would such a plant be able to do that?

A. I think not—and operate the placer.

Q. You mean by that it would take all of the energy that your plant would develop and use there for the purpose of successfully working the placer?

A. Energy—in lighting.

Q. Is that right?

A. Yes, if you consider the operation of a saw mill as touching that.

Q. Now for the purpose of successfully working it and extending it in the manner that you have generally outlined it would practically take all the water that was running there, wouldn't it?

A. It would.

Q. So that it could not be used for any other purposes of distribution?

Testimony of L. K. Armstrong.

A. I do not see where there would be water to do with.

Q. Have you any idea how long it would take the plant you have outlined to work up this ground?

A. I don't know—I didn't figure on the time at all. It is a matter of figures. I figured on several years. I would be safe in giving it ten.

Q. Something over ten years?

A. Over ten years.

Q. Might be as much as twice that much?

A. I would not care to say. I based my estimate above ten years and twice that is double.

Q. That is—?

A. I would not care to commit it to that statement.

Q. Would you be willing to say that it would not take twice that length of time running successfully in a reasonable way with the plant that you have outlined?

A. I would not want to be quoted as saying that it would not.

Q. That means, of course, I suppose, it might take that much time, would it—is that right?

A. I have made my answer.

Q. You don't want to answer my last question then?

A. I have answered it.

Q. Have you included a saw mill in estimating?

A. I think not.

Q. It is included in your \$50,000.00 estimate?

A. Yes, sir.

Testimony of L. K. Armstrong.

Q. It kind of seems to me that you said so. I confess I have forgotten?

A. The estimate which was in excess of \$50,000.00 I think included it.

Q. How much would the saw mill cost?

A. That would be a hard thing to estimate, but I should say \$2,500, installed.

Q. I take it from your general observations that this plant that you are suggesting to be put up there, and working now in a reasonable and prudent manner—I suppose that it should be worked continuously?

A. Yes, sir.

Q. That is, continuously?

A. Yes, sir.

Q. Suppose that the operations will commence when they do commence and continue indefinitely?

A. Yes, sir.

Q. And by continuously I mean not at intervals, but day after day and season after season?

A. Day after day and season after season.

Q. It would be, I suppose—if I am wrong correct me—more or less expensive to shut down a plant of that kind and size and commence again?

A. I would not do it.

Q. That would not be a prudent way to do?

A. No—that is a very good word—it would not be a prudent way to do.

Q. Now when you mention the buildings and tools and shops, etc., what buildings do you mean other than the saw mill?

Testimony of L. K. Armstrong.

A. Generally, the buildings about a mine.

Q. What?

A. The general buildings about a mine.

Q. How many would there be ordinarily?

A. I would say half a dozen buildings,—might be more.

Q. And about how much did you estimate their cost?

A. It would be difficult to estimate the cost of the buildings very accurately. You might put them up for about five to eight hundred dollars apiece, including material and labor.

Q. And shops, you mentioned the word “shops”,—what did that word mean?

A. That would be a blacksmith shop and repair shop

Q. How much did you estimate that?

A. I included that in my estimate.

Q. Of buildings?

A. Buildings and shops,—I more particularly wanted to refer to the equipment of the shop and, rather as distinctive from the power house proposition,—buildings and shops,—

Q. You say you think it would cost to remove the dirt and material which would have to be removed to work this as a placer about 4 cents a yard?

A. About 4 cents a yard.

Q. In making the estimate how many yards did you estimate you would have to remove?

A. That might vary materially—it might vary from 4,000 to 10,000,—either one of them are possible on the property.

Testimony of L. K. Armstrong.

Q. From 4,000 yards to 10,000 yards?

A. Per day of 24 hours.

Q. Well, I refer, Mr. Armstrong, to the total amount that you contemplated you would remove?

A. In total you mean?

Q. Yes, sir?

A. I have already stated that there were several million yards to be removed in total.

Q. But you don't make any more definite estimation of the total amount to be removed?

A. I do not and for these reasons. Any minimum estimate that I might put it at would be profitable under the operation that I have in contemplation.

Q. Well, how much depreciation did you figure on the plant when you made your estimation?

A. Depreciation would probably be about 10%.

Q. Annually?

A. 10% annually.

Q. What did you say, Mr. Armstrong?

A. I didn't make specific figures on the depreciation. That is a matter which is pretty well worked out.

Q. How much did you figure as interest on the investment?

A. The interest on the investment might be figured at 8%.

Q. Per annum?

A. Per annum.

Q. How much did you figure that the gold would run per yard?

Testimony of L. K. Armstrong.

A. On the basis of the ground that I made the sampling on exclusively, I figured it at 12 cents.

Q. And that was based on what?

A. That was based on the evidence already in court of the probable number of pans to a cubic yard.

Q. Then in giving your testimony as to the estimate of 12 cents per cubic yard, that was based on the evidence that has been testified to in court by the other witnesses?

A. By the appellant.

Q. By the appellant?

Mr. BLAIR: Defendant you mean?

A. The evidence of one Mr. Collier.

Q. You based your estimate on his report?

A. I based my statement as to the 12 cents on his report, he has an estimate of the number of pans to the cubic yard of ground and put it at 150 pans.

Q. Where did you hear him state that, Mr. Armstrong?

A. It is in evidence in court.

Q. Where is it in court?

A. There.

Q. You have read his deposition?

A. I have.

Q. What is that?

A. I have.

Q. You mean that you saw that in his deposition?

A. Yes, sir.

Q. But as to the amount of the value of a cubic yard,

Testimony of L. K. Armstrong.

where did you take that from, from the evidence of that by either party, or the witnesses?

A. The value per cubic yard?

Q. Of dirt?

A. I took that from my own examination.

Q. How long did you examine the property—how long were you up there?

A. I was three days on the ground.

Q. And how many pans did you say you took?

A. Personally I took on the ground 12 pans. I should like to add to that if I am permitted—

Q. Well, you have a right to explain in answering.

A. In addition to which I superintended the panning of about 40 more pans. I say “about,” because a few pans were taken up past the limits of the claims.

Q. When you say you superintended the taking of 40 more pans you mean that you were present when somebody else panned them, is that right?

A. Personally I had them panned. It was under my supervision. I was not only present but I saw it done.

Q. And your estimate was based on the 52 pans that you have last described?

A. My estimate was based upon the 12 pans which I myself panned.

Q. And what fineness did you figure that the gold was in making your estimate?

A. How is that?

Q. On what fineness did you figure?

A. What degree of fineness?

Q. Did you consider the gold was?

Testimony of L. K. Armstrong.

A. I graded it with a value of \$19.50 per ounce. My figures were based on \$19.20.

Q. Your estimation then was based on that degree of gold—fineness of gold?

A. Yes, sir.

Mr. BLAIR: \$19.20?

A. My figures were on that conclusion. It was worth \$19.50.

Q. Can you tell by looking at the gold how fine it is?

A. I cannot.

Q. Approximately?

A. I cannot.

Q. You done most of your panning I believe you said on the Peabody, is that right?

A. Most of them, yes sir.

Q. What relative part?

A. Three-fourths of them exactly. I am speaking now of my own panning, the 12 pans.

Q. Well, speaking of that if you desire to confine it to that?

A. Yes, sir.

Q. You took three pans on th the Wickman?

A. Yes, sir.

Q. And the 40 pans which you superintended the panning of they were in what proportion taken from one or the other of the claims?

A. More largely from the Peabody.

Q. Do you remember of any number?

A. I do not recall the exact proportion.

Q. The proportion?

Testimony of L. K. Armstrong.

A. No.

Q. Does gold vary in fineness?

A. Certainly does.

Q. May not this gold be of different fineness in different parts, even, of the claims?

A. Yes sir,—varies very little apparently.

Q. You say apparently,—that is from your examination by the eye, is that your opinion?

A. I will make a little explanation there if necessary and it can go or not. There are two ways by which—there is a way by which one may determine the relative value of gold on the same property. The finer the gold is the more apt it is to be—the finer in size of particles the more apt it is to be finer and higher in grade. Therefore I should assume immediately that the gold which I found at a place without the limits of the placer was a secondary deposition, from the same deposition, was of a higher grade than the gold which I found on the property itself. Also that the gold which I found on the Wickman might be a shade higher in value than that found at other places where the gravel was coarser, particularly near the water.

Q. What is the lowest grade of gold that you have seen, I mean,—I don't know whether you would call it "raw" or not—I mean fresh gold in the sense of being new?

A. Based on official reports?

Q. No, I mean of your own observation—that you have personally examined?

Mr. BLAIR: That is generally, do you mean?

Testimony of L. K. Armstrong.

Q. No, I mean specifically, how low he has ever seen gold in fineness?

A. I had occasion to visit the assay office in Seattle and have seen a good deal of gold that came from Alaska, and the Yukon and excluding that, which I don't regard as having any value in this case, the lowest grade of gold I have personally—personally have knowledge of in this locality is found on the Swauk and runs a little better than \$15.00 per ounce in gold—between \$15.00 and \$16.00.

Q. Did you ever see any lower grade gold than that anywheres?

A. I never mined in lower grade gold.

Q. Did you ever see lower grade gold?

A. I said I was in the assay office at Seattle and I saw gold that by official test proved to run down to a little above \$13.00 I think if I recall it correctly.

Q. That looked just like the other gold, didn't it, or didn't you see it when it was new, before it was tested?

A. I don't recall that.

Q. There really is not very much difference in the appearance of gold in its native state, is there?

A. Oh, yes.

Q. That is, does the color of gold in its native state indicate its fineness?

A. Not necessarily.

Q. That is what I mean?

A. Yes sir. There is another method by which I should arrive at the approximate value of the gold up there per ounce which I think ought to be introduced.

Testimony of L. K. Armstrong.

Q. Do you know where the gold came from on these claims, Mr. Armstrong?

A. I was not there when it was deposited, if that is the question, but otherwise I have a pretty fair knowledge.

Q. Based on what?

A. Based on my knowledge of geology.

Q. Where do you consider the gold came from?

A. I consider that due to the topography of that country and the mineralization of the adjacent territory that the greater part of this gold came from the mineral belt lying to the North—northwesterly and northeasterly, because it is the most convenient, and that territory has a drainage and the drainage flows out over the end of these claims, evidently has flown across them,—whereas, more distant mineralized belts would carry the contents to a greater distance and owing to the peculiar topography I would say, would find it more difficult to deposit the gold on these claims. Am I lucid?

Q. You don't think that it came from the Columbia river then?

A. Well, the Columbia river evidently was a carrier. The Columbia river has no gold. The Columbia river is a carrier only. It has no gold.

Q. In your opinion then, did the Columbia river deposit this gold where it is?

A. In part—in part only.

Q. Well, in what part do you think it did?

A. I never figured relatively at all—even the deposition of the Columbia river as a carrier is more likely

Testimony of L. K. Armstrong.

to have come from the mineral belt that I have indicated than from any other source.

Q. Then I take it from your answer that the Columbia river did not store that gold in any substantial degree on these claims?

A. The Columbia river—you mean deposit it?

Q. Deposit it, yes sir?

A. The Columbia river acted as an agent.

Q. Do you mean to say in a substantial degree?

A. No doubt—no doubt.

Q. Well, the Columbia river do you mean to say was the agent by which it was transferred from the mineralized country that you refer to to the northwest?

A. Not the agent—from the northwest?

Q. Yes?

A. It was not.

Q. If it was brought down there from the northwestern mineralized belt?

A. Speaking of the northwest I mean this section up here (indicating) there, up this particular gulch which runs up into the mountains and I might say at least 4 or 5 miles and on both sides of it and at the head of it or the different heads of the branches there are quartz mines and part of which are now being worked along the deposit.

Q. What is the character of the gulch,—does water run in it?

A. It is dry, too, at present. The ground at this point (indicating) is higher than at that point (indicating), and the same is true of this point here (indi-

Testimony of L. K. Armstrong.

cating) being higher than that (indicating). Therefore, under the conditions, that much of the drainage of this country here went on to—much of the drainage to the west on exhibit “T”,—much of the gravel was deposited, and material, I will say, and more so, where I think was deposited from an erosive tendency, on the lower end of the Wickman, on the west end of the Wickman, by means of a gulch extending from the mineralized territory to the northwest down and uniting with the Columbia immediately to the west of the westerly end of the Wickman. That is one.

Q. Now in what way did the Columbia deposit any gold on the claims,—if it did deposit any material on them where did it come from?

A. From points along the mineralized belt particularly right—particularly easterly.

Q. Where was you figuring the Columbia run when that was done?

A. When all this was deposited?

Q. Yes, sir?

A. The Columbia run along practically the same as it would at present—does at present.

Q. In what degree larger than it is now?

A. The stream?

Q. Yes, sir?

A. The stream must have—having reference to the quantity of the water the stream must have occupied—along this particular section, a little different location, more to the north at a somewhat higher elevation and the gravel was deposited where it is after it was car-

Testimony of L. K. Armstrong.

ried by the stream and there is evidence of more shallow water even above the present water level, which I mention, to carry on my geological examination, in a sub-stratum of clay, which we have not touched upon, and which underlies much of the dirt to all appearances, and seen by me, nearer the southwesterly, not far from the southwesterly corner of the Wickman. Not far from the junction (I don't know what that would be called) the corner—not far from corner 4—southwesterly from corner 4 of the Wickman and along the southerly bench of the present Nespelem river. I might take up all the afternoon with this answer, I might talk all the afternoon on this, if necessary. I would like to go into an exhaustive talk on the subject of geology. I don't know whether the question has been answered or not. If there is anything I have forgotten I will think of it later.

Q. Now then, after looking at exhibit "F" after striking it with a pencil there I notice on top of the black sand some particles, you see them, do you not, Mr. Armstrong?

A. Yes, sir.

Q. That is what they call, some of it is coarse and some of it fine gold?

A. Yes sir. That is a relative term, Mr. Avery. I am referring exclusively to the claims when I say that.

Q. You say you panned along the Nespelem on both sides and found gold, and generally I believe you said it could be discerned without the aid of a magnifying glass?

A. Yes, sir.

Testimony of L. K. Armstrong.

Q. How small a particle of gold can a man of ordinarily good eyesight see in black sand such as we have in this bottle, exhibit "F"?

A. That is a pretty difficult question to answer. The very nature of the gold itself would preclude any answer that was within a reasonable limit. That gold might be very flat and thin or be perfectly round or otherwise, or anywhere between.

Q. Then it would depend upon whether it was flat or whether it was more cubical or solid or round?

A. It is a question that cannot be answered intelligently.

Q. You would take, for instance, the smallest color of gold that you can see with your naked eye,—about how many of them does it take to make a cent?

A. As I stated I would not care to answer the question.

Q. After an examination of the gold in the bottle exhibit "F" to the best of your ability, how many colors or how many particles of fine or coarse gold are there in there?

A. How many particles?

Q. Yes, sir?

A. I cannot tell. I have absolutely no knowledge.

Q. Have you no knowledge as to that—can you so manipulate this bottle as to bring the larger or the largest of them to the top?

A. I can.

Q. Well, attempt to do so, if you please, and I will

Testimony of L. K. Armstrong.

ask you how much in your opinion is the largest piece worth?

A. It would not be possible without removing this one from the bottle which is a very poor medium to look through to tell. I would not care to base any sort of an estimate upon it.

Q. You would not want to make any statement or estimate of the value of the largest of the particles that you discover in the bottle?

A. I would not.

Q. This bottle has a tendency to magnify, hasn't it?

A. I think not.

Q. Don't you think that that has a tendency to magnify?

A. No sir, I don't think so.

Mr. BLAIR: I will stipulate, Mr. Avery, that the cork be broken and the gold may be taken from it and that either counsel at the time of argument may take the gold from there.

Mr. AVERY: I will take that up when we argue it.

Mr. BLAIR: I think that would be the proper thing to do.

Q. Well, in making your estimate of 12 cents per cubic yard, didn't you estimate how many colors it would take to make a cent?

A. I did.

Q. What did you figure?

A. My figures—

Q. What did you estimate I should put it,—more correctly say?

Testimony of L. K. Armstrong.

A. I should figure exclusively on what I panned and I think I stated in my evidence before about what my basis of calculation was. I would not care to make any statement of it now.

Q. You don't remember independently then of what you then testified?

A. Not without some time.

Q. Not without what?

A. Some time.

Q. Now I will ask you, Mr. Armstrong, if a piece of gold is substantially globular, how many of them it would take to make a cent; with gold merely and just discernable with the naked eye?

A. I would not attempt to answer the question.

Q. Can I make it any clearer; that word globular indicates what I mean?

A. Spheroid.

Q. Spherical is rather better—you would not attempt to say?

A. I would not.

Q. Don't you think you could state it with reasonable accuracy?

A. Not with any degree of satisfaction.

Q. My last question was regarding the value of the piece of gold that I then described. I will now ask you if you can, referring to the description of the piece of gold that I have just given, if you can say how much it weighs?

A. I cannot.

Q. Or ordinarily should weigh?

Testimony of L. K. Armstrong.

A. I cannot.

Q. You didn't take any pictures of the bench land or plateaus on these claims, did you?

A. They are too badly broken, Mr. Avery, to get—in fact I will make a more specific statement. My apparatus as is evidenced from the views taken was too small to take comprehensive views.

Q. You don't—did you take any views of the plateaus or bench land on the two claims?

A. I took no comprehensive views as I recall. I think I have all of the exposures that I made excepting one or two that were defective. I think I shot two on the one plate and another one was only a view over a bluff and I have them all except those.

Q. Referring to defendant's exhibit "K"—how far from the mouth of the Nespelem was that picture taken. How many feet west approximately,—well, no,—east?

A. I don't know the approximate distance. I might arrive at it.

Q. On the map it is about a quarter or three-eighths of an inch is it, or half an inch from corner No. 6?

A. You might say half an inch east of corner 6 on the map, approximately.

Q. Have you been on these grounds before?

A. Never.

Q. I meant, of course, until last week?

A. Until my one visit.

Q. You have been up to the quartz mines before, haven't you?

A. No sir, I have not.

Testimony of L. K. Armstrong.

Q. Never went up into that country?

A. Never was in the district before.

Q. Never was up in the district before?

A. No sir. And I will tell you for your edification, I want to say I was in the district 8 days instead of three. I want to make that suggestion,—I don't know as it has any bearing on the case.

Q. I was asking you how many days you were down on the claims?

A. Yes, I was three days. I went to that extent and I will say I was in the district 8 days at this time.

Q. Where did you stop, that is sleep and eat?

A. I slept at the hotel.

Q. As Nespelem?

A. Yes, I did.

Q. Go down each day, did you?

A. Yes, sir.

Q. What time did you go down?

A. I went down two mornings, left the hotel at 8 o'clock.

Q. How long did it take you to go down?

A. I was approximately an hour—on horseback each time.

Q. Take the first day where did you lunch?

A. I lunched on the ground.

Q. Take your lunch with you?

A. Yes, sir.

Q. What time did you start back?

A. I started back near 6 I think it was,—a little after 6.

Testimony of L. K. Armstrong.

Q. You ate dinner, the night meal, at the Nespelem hotel?

A. Yes, sir.

Q. Was that your experience each of those days?

A. No, I left earlier the third day and returned home later also I think 'on the 3rd day. I don't recall.

Q. You left the hotel earlier that morning?

A. Left the hotel earlier, yes sir.

Q. And stayed longer at the grounds, spent more time there in other words?

A. As I recall it about an hour longer.

Q. Now did you consider, Mr. Armstrong, with the examination that you made of these claims, considering the time taken and what was done and bearing in mind that it is 260 acres in area or approximately that, do you think that in view of the amount of expense and cost of the installment of a plant and working it, of the value that you have stated, do you think that you have made such an examination as is warranted and such an examination as is sufficient to pass upon the value of this claim as a hydraulic diggings, I mean profitable hydraulic diggings?

A. I will have to be a little more verbose perhaps than I ought to in my answer. My knowledge of the property is not confined to my personal investigation. I have been consulting engineer for this company for some time and under my instructions, and independent of them, they have made numerous and various widely separated examinations of this property.

Testimony of L. K. Armstrong.

Mr. AVERY: I object to your stating what anyone else has said or done.

A. (Continued) Mr. Avery it is absolutely impossible—in addition to this I was accompanied by some of the very people who made these examinations and who are the people that showed me the ground carefully upon which an estimate had already been made by themselves and based upon this knowledge and my own examination I believe that the company would be justified in installing a hydraulic plant preliminary to a more thorough investigation of all the area, more especially that of the Wickman and back remotely from the stream. At my suggestion, and independent of it, it had been intended to sink holes in the ground and take samples in that manner. I think I have answered the question.

Mr. AVERY: I think you have answered everything else, at least.

At this point the hearing was adjourned until 2:00 P. M.

2:00 o'clock P. M., July 23, 1909.

Hearing continued pursuant to adjournment.

Mr. L. K. ARMSTRONG, recalled for further examination.

By Mr. AVERY:

Q. Now at least that is the only answer you can give, I assume, Mr. Armstrong?

A. I regard that as the most specific.

Mr. AVERY: That is all.

By Mr. BLAIR:

Testimony of L. K. Armstrong.

Q. How much stock do you hold in the company, Mr. Armstrong?

A. The books show 4,000 shares. I think that is all.

Mr. AVERY: I move to strike it out as not being responsive and hearsay and not the best evidence.

A. I will answer more directly, if required.

Q. Well, what is your answer?

A. 4,000 shares. I did not mean to be indirect in the first place.

Mr. BLAIR: That is all.

Witness excused.

THE EXAMINER:

The case is continued by consent of counsel subject to the call of the examiner. It is agreed that at the time of putting in the rebuttal evidence that the complainant may introduce another witness in its case in chief and that at that time the defendant may put in the report of Mr. A. J. Collier made to the government, to be subject, however, to all proper legal objections except as to the time of presenting it, and the defendant at that time, if it desires, may put in testimony as to the amount of horsepower in the Nespelem river on these claims.

Mr. AVERY:

It is further stipulated that the complainant has now offered in evidence the deposition of Arthur J. Collier taken in Washington, D. C. and that it is stipulated that it is as completely in evidence as if offered at the time of argument in this case or at any other period, subject to such legal objections as the defendant sees fit to make as to its competency.

Testimony of Howland Stevenson.

Mr. BLAIR: I assent to that.

Hearing adjourned sine die.

Spokane, Wash., Dec. 18, 1909.

10 o'clock A. M.

Hearing resumed pursuant to call of examiner.

Mr. A. G. Avery, U. S. Attorney.

Mr. John E. Blair, Attorney for Defense.

Mr. B. B. Adams, Examiner.

Mr. HOWLAND STEVENSON, a witness called on the part of the complainant, in rebuttal, was duly sworn and testified as follows:

DIRECT EXAMINATION.

By Mr. AVERY:

Q. What is your name, Mr. Stevenson?

A. Howland VanNess, but I don't use the word VanNess very often.

Q. Where do you reside, Mr. Stevenson?

A. In Spokane.

Q. How long have you resided in Spokane?

A. Well the last time since I have lived here in Spokane I have been here permanently, resided for about six years.

Q. What is your occupation, Mr. Stevenson?

A. Mining.

Q. How long have you been mining?

A. I think it is, well, 30 or 31 years.

Q. Explain to the court what has been your experience, the character of experience you have had during that period?

A. Well, I have been superintendent of a great many

Testimony of Howland Stevenson.

mines. I have examined a great many mines for other people and I have been prospector. I have been workman under ground and I am now generally what you might call an expert miner, in the examination of mines.

Q. That is your present occupation, the examination and reporting on mining claims and mining properties?

A. Yes, sir.

Q. That does what, you say, refers to placer mining?

A. Yes, sir.

Q. What states does that experience cover?

A. Nearly all of them west of the Mississippi. Montana, Idaho, Washington, British Columbia, Oregon, Arizona, Colorado, New Mexico, Utah and California.

Q. And Washington?

A. In Washington.

Q. Are you familiar with the Nespelem country, what is known as the Nespelem country?

A. Nespelem country?

Q. Yes, sir.

A. Yes, sir.

Q. Do you know where the Nespelem river runs into the Columbia river?

A. I have been at the mouth of it, followed it pretty nearly from its head to the mouth.

Q. That is the head of the Nespelem to its mouth?

A. Yes sir, both branches.

Q. Both branches?

A. Yes, sir.

Q. When did you first look over the country, Mr. Stevenson?

Testimony of Howland Stevenson.

A. Now, I cannot answer that correctly without looking back.

Q. I don't care exactly.

A. Some years ago.

Q. And how much territory did your examination cover?

A. Well, it—my first experience in the Nespelem country was with the Haddy. E. Company. I was superintending some properties there for them and during that time I looked over the country generally. I afterwards made several trips into the country looking over different mining claims in the country, and then in August of this year I was out there and made an examination of the river, Nespelem river and some lands lying adjacent to the Nespelem river and also to the Columbia river.

Q. I call your attention to complainant's exhibit No. 4 and ask you if you recognize the place, the locations there of the Peabody and Wickman placer claims?

A. I do.

Q. Have you been over those claims and made any examination of them?

A. I have.

Q. That was in August that you refer to?

A. Yes, sir.

Q. Last August?

A. Yes, sir.

Q. Are you familiar with the panning of gold—placer mining?

A. Yes, sir.

Testimony of Howland Stevenson.

Q. I will ask you what if any examination you made with respect to those two claims last August, and the result of that examination, if you can, tell the examiner about that time and what the result was and the purpose of your examination, whether you were trying to find gold or not, using your own language in stating it?

A. I was sent out by the government to make an examination of these two placer claims. I started at a point on the Nespelem river which is up above the dam there—

Q. Let me ask you a question—this map don't show it—it is up above the dam?

A. Yes sir. I suppose I may refer to my notes, may I not?

Q. All right, yes.

A. I can give the narrative day by day.

By Mr. BLAIR:

Q. Can you testify without reference to that. Have you a recollection of what you did without reference to the memorandum?

A. I might answer the questions.

Q. If you want to give it in narrative form from that all right?

A. Using the memorandum?

Q. Was that made there at that time?

A. At that time, each day, 15th, 16, 17th, and so many different days of August that I was there.

Q. By yourself?

A. By myself.

Q. Well, you may testify to as much as you can and

Testimony of Howland Stevenson.

in testifying you may refresh your recollection, Mr. Stevenson, and if after looking at that you have an independent recollection you testify to that.

A. Well, I will try to testify without going to this.

Mr. AVERY: I want to impress on you this fact that if by looking at that and seeing it and then the things that you see there if you have an independent recollection of them, you had a right to so testify as to that.

A. I started at a dam and head gate, making a little examination of that and made an examination of the country from there; found the dam situated at the head of a deep canyon and made for the purpose, of course, of holding back the waters. From that dam there was a ditch run out to the westward. I have the figures as to the measurement of that ditch,—quite a ways the ditch had been blasted, blasted for a ditch, or blasted for a flume I should say, it was a ditch or place to lay a flume, until they came to a sharp break in the mountain side. Then I dropped down that sharp break in the mountain side about 75 feet I should say and in the bed of the creek, or Nespelem river, there had been an excavation made there evidently for the purpose of some building. From there the ditch led out—

Mr. AVERY: Just confine yourself, in order to save the record, to your effort to discover gold.

A. On the upper place that I have just described, was nearly all of it was blasted out of solid rock in the mountain side and consequently there was no placer gold there.

Mr. BLAIR: Just cut out your opinion.

Testimony of Howland Stevenson.

A. I started panning on this lower ditch and I panned on that ditch all the way to where it—of course, there is breaks in the ditch, and there are high areas, and also followed the main ditch clear up to where it crosses up on the Wickman placer claim. I run out along this ditch all the way.

Q. Which way?

A. All the way up to its end, near the corner No. 2 as marked on the exhibit.

Q. And you are now referring to that line that runs along the upper part of the Wickman placer claim?

A. Yes sir, and also enters in the Peabody placer claim.

Q. Did you find any gold in that ditch?

A. No, sir.

Q. Do you know how many samples you took out of it?

A. Well, I could,—I have got it here from day to day.

Q. All right?

A. I took a great many.

Mr. BLAIR: State the number?

Mr. AVERY: State as near as you can, you may refresh your recollection.

A. Let me get on the ditch here (examines book). From the west end of the ditch to the first break, about a quarter of a mile the ditch is mostly in sand and loose soil. I only saw one place in that distance that showed any sign of gravel and that was hardly gravel, being rocks with sharp edges, few round ones.

By Mr. BLAIR:

Testimony of Howland Stevenson.

Q. How many pans did you get. I think that was the question?

A. The pans.

Q. How many?

A. I could just figure them up here. I took nine pans along that ditch.

Q. Along that whole ditch?

A. Yes, that is from—

Q. Where is it?

A. Along here (indicating), nine pans in there (indicating). From this point to that point (indicating) I took nine pans.

Q. Just state it on there so the stenographer gets it down. You say you took nine pans there in the ditch where it enters into the Peabody, from there to the end of it on the Wickman placer?

A. Yes, sir.

Q. What other examination did you make to ascertain whether there was any gold in either of these placers?

A. I examined all of the pits or shafts that I found on on these two placer claims. Most of them had been caved. On two I found some gravel lying on dumps, on two of them, here close to the river, a little ways back from the river, and I took several pans from all of that gravel, on both of these pits, and there was no gravel there in any of the pits.

Mr. BLAIR: What?

A. No gravel there in any of the pits and only on the two pits did I discover any gravel lying on the surface,

'Testimony of Howland Stevenson.

that looked as if it had been taken out of those pits. The other pits were all in very loose soil. In all of these pits I took pannings and in not a single one nor in the gravel of the two pits that I just mentioned did I find any gold whatsoever.

Q. Do you know about how many pits there were in all that you refer, if you can give it about correct?

A. About ten.

Q. Ten what?

A. Ten pits.

Q. Did you make any other surface examination of the claims?

A. I followed the river from where this dam was down the canyon and to its mouth.

Q. That is the Nespelem river?

A. The Nespelem river. For quite a distance the river is in a rocky canyon and is very steep, quite a great fall there and when the river gets down to where it is flatter I examined several bars, gravel bars on both sides of the river and the banks of the river on both sides and I took in the neighborhood of thirty pans of dirt along there, I think it was 32, I would not be positive as to that amount, and I found in numbers—in numbers of those pans I found considerable black sand, more or less, and some garnets, but not in a single pan did I find a single trace of gold, that is placer gold, visible gold to the eye or to the glass.

Q. You are referring now to your examination of the Nespelem river from its mouth up to the time it goes out of the claims on the north?

Testimony of Howland Stevenson.

A. Yes sir. I found some sluice boxes there.

Q. How many days were you occupied in the examination of these claims, Mr. Stevenson?

A. I think it was five days.

Q. Just state the days they were, if you please.

A. August 15th, and 16th and 17th—I have not put it down, but it was August the 15th and 16th and 17th and may be 18th I think—I know I was four or five days. There was one day that I was examining on the other side for cross ledges, etc., and was not down on this ground, I mean the east side of the river. I was on both sides of the river and up higher all this time, up in the Nespelem proper. That is what you might call the lode portion of it, where the lodes are.

Q. What is the character of the country on the north of these claims?

A. On the north?

Q. I mean after you get up on the benches?

A. On the north of the Peabody and Wickman claims?

Q. Yes, sir.

A. It is mountainous, quite high.

Q. Is there any agricultural lands around there?

A. No, there isn't near the mountainous part of it, agricultural land, no sir.

Q. Is there any in that vicinity?

A. Well, on the Peabody placer and the Wickman have been taken up.

Mr. BLAIR: Just one second. You were asked whether or not it is agricultural land?

Testimony of Howland Stevenson.

Mr. AVERY: You may answer whether or not the Peabody placer is agricultural land?

A. Why, yes sir.

Q. Is there any between Nespelem, the camp of Nespelem on the north and these claims—is there any land in there of an agricultural character?

Mr. BLAIR: I object to that as being incompetent, irrelevant and immaterial.

A. The low flat from the town Nespelem down to where the river breaks in the canyon with water on it would be magnificent agricultural land.

Mr. BLAIR: I move to strike that as containing an expression of opinion of the witness and as not being responsive to the question.

Q. That is between the Nespelem camp and the claims?

A. Yes, sir.

Q. Do you recall the character of the country that is east of the Nespelem river and after leaving the top of the hill, the bluff that goes up over the Nespelem river opposite these claims?

A. Yes, there is some—

Mr. BLAIR: Do you recall?

A. Yes—there was.

Mr. BLAIR: Wait until Mr. Avery asks a question.

Q. What is the character of that land?

A. That would be the east side of the Nespelem river?

Q. Yes, above the bluff there.

A. Above the bluff there are ranches on it now, agricultural lands.

Testimony of Howland Stevenson.

Q. What was the character of your examination of these claims, was it casual or thorough?

A. I made it as thorough as I could.

Mr. BLAIR: I object to that question as incompetent, irrelevant and immaterial and move to strike the answer because it is a conclusion of the witness. The court can determine whether or not his examination was thorough.

Q. What appliances did you have, Mr. Stevenson?

A. I had a pick and shovel and two pans and sack—two sacks. I had several small sacks about this size (indicating) and two gunny sacks and I had five or six smaller sample sacks, they would be about twelve inches long and possibly eight inches wide.

From your examination of these claims in the way you examined them in your opinion were you able to ascertain whether or not that was valuable ground for placer mining?

Mr. BLAIR: I object to the question as calling for a conclusion of the witness.

A. I don't think anybody could have got any gold.

Q. You may state whether or not—?

A. Yes, sir.

Q. I ask you whether or not these claims, or either of them, are valuable for placer mining?

Mr. BLAIR: I object to the question as immaterial.

A. In my opinion, no sir.

Q. Did you find any gold in your examination of either of the claims?

A. Not a trace.

Testimony of Howland Stevenson.

Mr. BLAIR: I object to the question just before the last on and the answer to that question on the ground that this witness has not shown that he is qualified as an expert.

Mr. AVERY: That is all.

CROSS EXAMINATION.

By Mr. BLAIR:

Q. Who asked you to go up there?

A. Mr. Avery.

Q. You knew that this case was pending?

A. I did.

Q. You knew that the government was striving to obtain this land from the Multnomah Mining Company?

A. I did not know. I knew that there was a case of the government against the Multnomah Company or the Multnomah company had a case against the government, but which way it was I did not know.

Q. What was involved in that case according to your understanding?

A. Why, the Peabody placer and the Wickman placer.

Q. One of them or the other was trying to get—?

A. Get possession of the land.

Q. And you understood that was the reason why the contest was on?

A. No, sir.

Q. You did not know that—you knew that the question of the presence of gold was involved?

A. I was told to go up there and see if I could find gold in paying quantities.

(Question read).

Testimony of Howland Stevenson.

A. I did.

Q. Were you directed to the places to which you were to go in the examination?

A. No, sir.

Q. Were you directed to examine the ditch and pits?

A. I was.

Q. Were you directed to examine the river?

A. I was.

Q. When did you go there?

A. Well, I left here I think it was—I missed a train up there by going to the wrong station. I left here I think on the 13th day of August and I missed connections by getting off at Wilbur, where I used to get off at when I should have got off at Almira.

Q. So you didn't get up there until the evening of the 15th?

A. And I got up there—when I got in there on the train and on that night I went with a team and I think I got there on the 14th.

Q. Now you left here on the afternoon of the 13th?

A. I went—if I had a calendar I could tell you, but I know—I think I left here on the 12th and I got there on the 13th and went up in the hills on the 14th and was on this ground on the 15th. I know I started in on this ground on the morning of the 15th.

Q. What time in the morning?

A. I left Nespelem—I got down there probably about nine o'clock or it took me about two hours in order to walk down to the dam.

Q. You stopped at Nespelem?

Testimony of Howland Stevenson.

A. I stopped at Nespelem, yes sir.

Q. Where did you stop while examining the property?

A. I stopped two days of the time at Nespelem and then I stopped at the cabin, that is about a little ways up from the dam, a miner's cabin and I stopped there one day in order to save walking back because it was very hot weather and I didn't like to climb up that hill as it was pretty hard work.

Q. You are an expert miner, you say?

A. Yes, sir.

Q. Are you connected with any mining companies at the present time, employed by them?

A. Well I am mixed up in the ownership of quite a number of mining properties.

Q. Just answer my question?

A. With any company?

Q. As an expert?

A. No sir, not at the present time.

Q. Now you have acted as expert miner for a great number of companies?

A. I have.

Q. Now in all these states that you have mentioned you were mining?

A. I guess I was.

Q. From Utah to California—and you say that was what kind of mining?

A. Both placer and ledge mining, lode mining.

Q. In all these places?

A. Yes. Well, let me think a moment, in Colorado,

Testimony of Howland Stevenson.

I think I had some ledge mining and in Arizona and New Mexico—I had some placer in those three states.

Q. Some placer in three states?

A. Yes, sir.

Q. What were those states?

A. Arizona, Colorado and New Mexico.

Q. And the rest of the time—did you examine placers in all the other states?

A. Yes, I did.

Q. Where in Montana?

A. Out near Philipsburg, about 12 or 13 miles from there I examined a property out there as to whether it would do for placer mining or not, that would be Granite County, Philipsburg, Montana, about 22 miles or 20 miles I guess southeast of Philipsburg.

Q. Was that a placer proposition there?

A. That was what I went to determine whether it was or not.

Q. What was the determination?

A. It was not any placer there, that is in paying quantities.

Q. How much was there there?

A. Sir?

Q. How much will you say was paying quantities?

A. What?

Q. How much would be a paying quantity?—how much do you estimate that?

A. Oh if I got three cents a pan I would take it.

Q. Three cents a pan?

A. Yes, sir.

Testimony of Howland Stevenson.

Mr. AVERY: I object to this as not being cross examination and also as not being material too, anything he did in Montana.

Mr. BLAIR: He testified that this was not a good proposition up there at Nespelem.

Mr. AVERY: That has nothing to do with Montana.

Q. What did you mean by your answer, did it have reference to placer mining generally?

A. I mean where we shoveled it into boxes and I am speaking now of this place in Montana.

Q. What kind of a proposition was that?

A. That was a tough one, we did not take it.

Q. Now have you examined any placer propositions similar in character to the Nespelem property in point of water and so on?

A. I do not consider the Nespelem property a placer proposition.

Q. (Question read).

Q. I mean in point of relation of water and soil?

A. I have never seen a property exactly like this, no sir, where they had water so convenient as this is.

Q. You had never seen a proposition that had water in better shape for hydraulicking than that property, have you?

A. Yes, I think I have down in eastern Oregon, where the water was in better shape than this because they had more water. The Nespelem river up here gets dry or nearly so at certain portions of the year.

Q. During the summer time?

A. Yes sir, at certain periods of the year, at certain

Testimony of Howland Stevenson.

seasons of the year their water supply up there is limited, during certain times.

Q. Assuming that there is gold down below this is a pretty fine water head?

A. Yes, sir.

Q. You panned up there, Mr. Stevenson, and carried your dirt of course to the water?

A. Yes, sir.

Q. Where did you pan, in the Nespelem or Columbia?

A. In both places.

Q. When you were working near the Columbia of course you took the pan there?

A. Yes—the exact point that I took to the Columbia, and those that I panned on the Nespelem,—I have the number of pans and the time and where I took them and how I carried them there.

Q. What kind of a pan did you use?

A. Two gold pans, ordinary miners gold pans.

Q. What is the diameter of them?

A. Oh about 14 or 16 inches across the top. I never measured them across, but from a recollection from the pans that I used.

Q. Where along the Nespelem did you examine?

A. Well, I examined from where the Nespelem comes out of the canyon and goes along the flat country, where I first met gravel on the Nespelem and met these gravel bars on both sides.

Q. Now just open that book there, Mr. Stevenson, please and take off your glasses. Do you find any difficulty in reading without your glasses?

Testimony of Howland Stevenson.

A. No, sir.

Q. What do you wear glasses for?

A. Why, I wear them—to rest my eyes. I have got a cold in my head and I wear them to rest my eyes when I go home and sit down.

Q. You use glasses though?

A. In the evening.

Q. Right along, don't you?

A. No, sir.

Q. Just take this bottle here which I will mark defendant's exhibit "U" for identification, and ask you to look at that and see whether you can see any gold in there?

A. I see a lot of black sand.

Q. Well, just look for gold.

A. (Witness examines the bottle by light) Yes sir.

Q. What is the nature of the gold in the bottle?

A. That is very fine placer gold mixed with black sand. I can see quite a lot of gold in there when you get it right here—that bubble of water makes it kind of difficult—yet there is quite a lot of gold in here.

Q. You found no gold like that in your examination did you along the Nespelem?

A. On the Nespelem, no sir, not on the Nespelem.

Q. Did you find any gold at all up there?

A. On the Columbia—there has been gold on the Columbia for years and years.

Q. I didn't ask you that question. I asked you whether you found any gold this time, on this trip?

A. I did, on the Columbia river.

Testimony of Howland Stevenson.

Q. You didn't testify to that in direct examination, did you?

A. I was not asked that question.

Q. You did pan along the Columbia at this time?

A. It went over to a bar,—not at this time, no sir. Some years ago I went over to a bar on the Columbia river and panned there on a bar that sets out in the middle of it and there I found some very fine colors.

Q. Now you testified in your direct examination that you panned on the property down the Nespelem and along the Columbia, I understood you to answer the Columbia?

A. I never panned along the Columbia at all this trip.

Q. Now you stated you examined some land adjacent to the Nespelem river and adjacent to the Columbia river.

A. I meant by adjacent to the Columbia river there and adjacent to the Nespelem that I meant the placer claim is bounded, I believe, on the south by the Columbia river and that is what I mean in identifying the ground.

Q. You didn't then go along the Columbia river and examine the Columbia river, and examine along the Columbia river at that point—examine along the south boundary that you speak about there?

A. Not on the Columbia river.

Q. Why didn't you examine along the Columbia?

A. It was not on this land.

Q. Don't you know as a mining expert that a bar such as that is apt to be continuous, that nature and kind of gravel and so on?

Testimony of Howland Stevenson.

A. I didn't see any bars along the Columbia river.

Q. Well, that lower flat there is almost continuous to the river isn't it, the Columbia river?

A. I believe it is.

Q. If you wanted to find out whether there was gold on the Wickman placer wouldn't you as a mining expert go to a break in the land such as the shore line presents there?

A. I did go along the Columbia river. That is I went along on the Peabody placer claim where there is a deep bed of loose stuff, some back water there and you can call that the Columbia or the mouth of the Nespelem.

Q. What do you call it?

A. It is the back water that the Columbia makes with the Nespelem coming down and there is a bar there all the way for several hundred feet.

Q. And that is what?

A. Caused by the back water of the Columbia river.

Q. Don't you know that that stuff at the mouth of the Nespelem there, that that was by its appearance, that it was newly made ground?

A. Along the Nespelem?

Q. It is re wash, isn't it?

A. It is not all wash, it is sediment from the bed of an old lake. There is a great big bar stands up there 20 or 30 feet high.

Q. Did you examine though down that bed of that, opening there?

A. I did.

Q. Now, in the bed of that opening in the mouth

Testimony of Howland Stevenson.

there, that is all new ground, isn't it, newly washed up by the flood water of the Columbia river?

A. There is great big boulders in it and some gravel.

Q. I am speaking now of the bed of the mouth of the Nespelem at that point? It is all covered by new fill with newly made earth, the bed right down there isn't it?

A. The bed right down there is covered with trees and soil and brush.

Q. How wide is the opening there of the Nespelem, the mouth?

A. At the mouth?

Q. Yes?

A. Why, I should say that it was. Well, it is four or five or six hundred feet. I would not be positive. I did not go over across there. It is some distance.

Q. Well, getting back to the other question, Mr. Stevenson. You did not pan along the Columbia river proper at this time in August?

A. No.

Q. Why didn't you?

A. There was not anything there to pan, no gravel along there on the Columbia. It is all soil, this is a flat, level country here, right there, runs up to the bench.

Q. Just one second. I want the stenographer to get what you call the flat, level country.

A. This excluded strip—there is a flat, level country.

Q. Now here, just one second. I am asking you questions: you say that this excluded strip is a flat level country?

A. There is a flat there, yes sir.

Testimony of Howland Stevenson.

Q. Do you say that that excluded strip is a flat in there, a level?

A. I mean this portion down here (indicating) right here west of the river—the Columbia river, a little flat in there. Then the banks run up 30 feet high, about 500 feet of level land then a bank about 60 feet high and then this level land runs clear over to the Peabody and a little west past it and then comes up here 30 feet (indicating).

Q. Down at the end of the Wickman?

A. No, that is right across in there (indicating).

Q. I am asking about this portion in here that we have heretofore called the excluded strip?

A. Well, there is a flat in there.

Q. How far does that continue down the claim?

A. Goes down here quite a distance and then the banks rise up pretty high again.

Q. Is there any gravel down along this part?

A. Not until you get back to this bank.

Q. Which bank?

A. The first rise from the river.

Q. Do you find gravel though before you strike the Wickman, don't you, back from the river?

A. Yes sir, a big gravel bank from that first 30 foot flat back is sand or gravel.

Q. Did you say you examined that?

A. Yes, I examined that.

Q. Did you examine anywhere from the water in the Columbia river up along this first bank?

A. Yes, along there.

Testimony of Howland Stevenson.

Q. Now then—

A. I don't understand that map.

Q. Did you examine from the water of the Columbia generally along here up in that direction up to the Wickman?

A. I examined the first rise there. I don't know where it comes on this map.

Q. Well, in that direction?

A. Yes sir. There is a big gravel bank along there. I made an examination of that bank.

Q. What showing, anything?

A. I took one or two pans along there.

Q. You said a while ago you didn't make any examination along the Columbia?

A. I thought that you meant the exact bank of the Columbia.

Q. Well now, where did you pan along there?

A. I panned along the big gravel bank where the Nespelem enters into the Columbia, where this bay sets in there, the bay back water along in there.

Q. Now you are pointing to the mouth of the Nespelem?

A. Yes, and on the Peabody placer.

Q. Now I am asking you, as you understand, whether you panned on that excluded strip which is south of the Wickman placer and between the Wickman placer and the Columbia river as shown upon complainant's exhibit No. 4. Did you pan at any place along the water line or upon any portion of that excluded strip that I have described and I am now pointing to?

Testimony of Howland Stevenson.

A. I do not know because I do not understand where that bank is in reference to this map.

Q. Well do you know—you did pan on, you say, the mouth of the river?

A. Along here (indicating).

Q. In the mouth?

A. About along here somewhere. I don't know as to this property.

Q. You don't know whether it was on the Peabody placer, was it?

A. Yes, on the Peabody placer because I located that by the stake.

Q. Why didn't you go down the Columbia river and pan down there a little bit along on the excluded strip?

A. I didn't know there was any excluded strip there. I never saw this map before.

Q. You knew there was ground there?

A. Yes, sir.

Q. Fixing it in your mind that there was ground there and that it was revealed by complainant's exhibit No. 4 that a certain portion of that ground is excluded from the Wickman placer,—now I ask you why you did not go down on that portion of the ground which by that map appears to be excluded from the Wickman placer?

A. I didn't see any gravel there to pan.

Q. Did you look?

A. Yes, I carried my samples down there to pan, down in there across the ground in panning.

Mr. AVERY: You mean to wash it?

Testimony of Howland Stevenson.

A. Yes, in washing it, the samples that I took I had necessarily to cross the ground to get to the river.

Mr. BLAIR: Q. Do you know how long it is from the mouth of the Nespelem down to the end of the Wickman placer, from corner No. 4 of the Wickman placer to corner No. 3 of the Wickman placer?

A. I could not say, in the neighborhood of—I didn't survey it, I found the stake there.

Q. How far do you think it is?

A. I would say in the neighborhood of 2500, may be 3,000 feet.

Q. I think you will find it a little bit over 3,000 feet?

A. Yes, sir.

Q. Did you go along the river, the Columbia river and examine for gravel deposits?

A. Nothing except from corner No. 4 of the Peabody up to the Nespelem up to where the Nespelem river comes in—corner No. 4 of the Peabody along there up to where this river comes in here. I examined that big bar there, a great, big, high bar.

Q. You say that the country back of the claims is rather high?

A. Yes, sir.

Q. Rises precipitously from the Wickman placer, doesn't it?

A. It rises pretty fast there.

Q. Rises precipitously?

A. Not precipitously, but it is quite high.

Q. There was ravines and gullies running down through that?

Testimony of Howland Stevenson.

A. There was.

Q. And a roadway comes down there in this side, in there as marked?

A. At the northwestern end of the Peabody there is a road, a wagon road comes down a great big gulch in there.

Mr. AVERY: Do you mean the Peabody?

A. The Wickman I mean.

Q. And from Nespelem down to that place it is down hill, isn't it?

A. From Nespelem town?

Q. Yes, the town, down to the placers, it is down hill, isn't it?

A. Yes, sir.

Q. Now you spoke, Mr. Stevenson, of the country east of Nespelem as being agricultural ranches?

A. There are ranches there now.

Q. How many acres?

A. I don't know.

Q. How far do they extend?

A. Oh well, they extend—let me see. There is I know ranches up here from Stephenson's Ferry down to the Nespelem.

Q. What is grown on those ranches?

A. Well, I used to—we used to get vegetables from a halfbreed that drove the stage that had a ranch down there.

Q. Down where?

A. If I remember rightly it is pretty close to the east side line of the Peabody placer.

Testimony of Howland Stevenson.

Q. That is not cultivated now though is it?

A. What is that?

Q. That land is not cultivated is it now. Was not cultivated this year?

A. That I don't know. I know he has got a ranch in there. Anywhere that they can get a little stream of water along there they can raise any kind of vegetables that they want to.

Q. They need irrigation do they, to grow crops?

A. I know that they grow better by irrigation. I don't know that they need it.

Q. Do they use irrigation there?

A. Wherever they can get it.

Q. Do they use irrigation along there on that land that you are speaking about?

A. I have seen a big ditch on the side of the road right into these Indian ranches.

Q. Right down there near this Nespelem property?

A. I know once I was down there once some years ago and I don't know whether he is a French halfbreed, he has a ranch there out a little ways and grows vegetables on it.

Q. It was a farm down there and he has a truck patch, is that it?

A. Well, I could not say how many acres he had plowed up and in cultivation. I know he had some.

Q. They don't grow corn and wheat do they, on that land?

A. I don't know.

Testimony of Howland Stevenson.

Q. You don't know what they grow, as a matter of fact?

A. I know that they grow vegetables because I bought them from him.

Q. But how many acres there are in that ranch right next to the Peabody, you don't know?

A. I don't know.

Q. You don't know whether there are 20 or 30 or 40 or 50?

A. I don't know.

Q. You don't know the quantity of the agricultural land there?

A. No sir, I know there is a flat up there and ranches.

Q. Right down on the edge of the river?

A. Above the bank of the Columbia it is all rock.

Q. Now you testified that this land was not valuable as ground for placer mining, did you not?

A. I did.

Q. You based that opinion altogether upon your experience in finding no gold there?

A. Upon the examinations that I made of the ground.

Q. You found not a trace of gold anywhere on the property?

A. I didn't find a single one in any of the pans that I took.

Q. If you should find colors such as are found in defendant's exhibit "U"—what quantity per pan of such colors as found in defendant's exhibit "U" for identification would you regard as making a property valuable for mining purposes?

Testimony of Howland Stevenson.

A. I would have to find a great many.

Q. Well, how many?

A. Well it would be impossible to count them because they are so fine that I could not answer that question as to number.

Q. Can you state approximately how many colors?

A. Of the weight and size of these?

Q. Yes, sir.

A. The average size these—

Mr. AVERY: I object to that before you answer. I object on the ground that the question is an impossible one and it is not susceptible of an intelligent answer by reason of the apparent impossibility to tell how much gold there is in that bottle and what territory it would be taken from and its value, excellence, I might say.

Q. You can tell the various kinds of gold, can you, one from the other?

A. Yes, sir.

Q. Do you know the difference between flake gold and nuggets?

A. Certainly.

Q. And flour gold?

A. Flake gold and flour gold are practically the same.

Q. Now what kind of gold is that there?

A. I would call that fly speck gold.

Q. That is a new name?

A. That is a rough name.

Q. What is the name?

A. It is almost impossible, it is not imperceptible, but it is very, very fine gold and the colors in there are very

Testimony of Howland Stevenson.

light and would be very hard to save and they would need a great many and it would almost run away. I don't think that could be saved with riffles.

Q. With riffles?

A. Yes, sir.

Q. Could not do that, save that in a ditch?

A. In a ditch?

Q. Yes sir, by sluicing?

A. You mean by shoveling in the sluices?

Q. Yes, sir.

A. Well you might save some of it if you had bur lap in there, but it would be pretty hard to save.

Q. You could catch that with mercury?

A. Catch some of it.

Q. Catch 90 per cent of it anyway wouldn't you?

A. I will not say that.

Q. Well you could do that?

A. I don't think you could, 90% is a whole lot.

Q. Well, 80 per cent?

A. If you could catch 40 per cent of that flake gold with mercury you would be doing very very well.

Q. Might some properties even though they saved forty per cent prove very valuable if they saved 40%?

A. If they have enough yes, to have forty per cent.

Q. Now the question I asked you a while ago was, considering the situation as you have testified to it as existing up above at the Nespelem and the lay of the land and the head of the water and so on, how many colors such as are contained in that bottle, defendant's exhibit "U" for identification, would you think neces-

Testimony of Howland Stevenson.

sary to be found per pan in order to indicate that the property was a valuable or paying proposition?

Mr. AVERY: I object to that on the ground that it is not susceptible of an answer and it cannot be told—I don't think it can be told how many colors there are in that bottle.

Mr. BLAIR: I am asking him about the relative size.

Mr. AVERY: I object.

A. There would have to be a great many hundreds.

Q. Per pan?

A. Per pan.

Q. How much return per cubic yard is necessary, would be necessary, up there have you any idea?

A. Up there?

Q. Yes, sir.

A. It would depend on the size of the gold, if the gold was susceptible of being saved,—was big enough to be saved.

Mr. AVERY: Just answer the question.

A. If you would give me—if you would give me ten cents a cubic yard of gold that could be saved on that ground—what would be the cost of—

Q. We are not asking you that question—the fact that you lose gold does not add to the labor or cost of that which you do save, does it. That you cannot save some of it does not affect the labor entailed upon you to work over a cubic yard of dirt?

A. If you get ten cents in a cubic yard and lose five cents of it the labor, the cost of the labor is doubled.

Q. Answer the question.

Testimony of Howland Stevenson.

Mr. AVERY: I think he has answered your question precisely, Mr. Blair.

Mr. BLAIR: He did not, Mr. Avery, at all, and the witness I think knows that.

Q. What profit per cubic yard in the return of gold is necessary to work such a proposition as you found at Nespelem?

A. That is a very hard question to answer for the reason that the ground embodied in the Wickman and the Peabody placer claims, with the amount of water that you have there can be moved so readily that a large amount of it can be taken away in a short time. If there was any gold in those placer claims I would say that even ten cents a yard, if you save ten cents a yard you would make that a paying proposition.

Q. Of course, you understand when you say, "If you save" that is saying in other words that you do get ten cents worth out of each cubic yard?

A. If you don't get ten cents worth out of each cubic yard the placer mine is not worth anything at all.

Q. Suppose that there was \$1.00 worth of gold in a cubic yard and you got out ten cents, that is a statement that it is worked with a profit?

A. Yes, if I can save ten cents—if I can save ten cents a cubic yard on that ground I am making money on the ground.

Q. Now this property, this other property in Oregon that you spoke of as being more favorably located for hydraulicking, do you know how much the profit was there per cubic yard?

Testimony of Howland Stevenson.

A. No, I don't, because in those days we never figured on cubic yards, we figured on clean-ups.

Q. On what?

A. On the clean-ups, how much we got out every week or every time we cleaned up. It was all coarse gold down there and cubic yards we never figured—that was before the days of cubic yards.

Q. You don't know though of a more favorable hydraulic proposition other than that, than this Nespelem property as far as water and lay of land is concerned?

A. Well I don't consider this a favorable proposition because of the absence of gold. That limits your question so you don't need any explanation.

Q. As far as the water and lay of land is concerned—I am just asking about those two features?

A. There is a place up there from Grangerville where the conditions are as favorable, even a little more so, than this, but if there was gold down on these two placer claims I would say this was an ideal placer proposition.

Q. Do you know anything about the new Bloomfield placer in California?

A. No, sir.

Q. It would not be possible, assuming that there was gold there, in the Nespelem proposition, to work that at five cents a cubic yard?

A. I might—you mean to say five cents?

Q. Could you work it at a cost of five cents per cubic yard?

Testimony of Howland Stevenson.

A. Oh yes—in working—I could move that ground at five cents a cubic yard when that water is put on there.

Q. What is the lowest amount you could move it at?

A. That I don't know what the lowest amount would be. I would like to get—it would depend on the amount of power, the size of the hose and also the dump.

Q. Well—

A. I can move all that ground down on, that is on the top of the ground, I can run that into the Columbia at five cents per cubic yard very easily.

Q. Can you run it in cheaper than that as a matter of fact?

A. Well I am not a contractor. I think I could move that ground for five cents a yard.

Q. Could not do it for three cents a yard?

A. I would not say that.

Q. You are not acquainted with the new Bloomfield proposition in California, are you?

A. No sir, I don't even know what part of California that is in.

Q. Now, I am going to read to you there as the basis of my question from a book entitled, "Hydraulic in Placer Mining", by Wilson,—Eugene B. Wilson.

Mr. AVERY: I object to counsels reading from the book.

Mr BLAIR: Q. The basis of the question which I am about to ask you is as follows:

Mr. AVERY: I object to reading from any book, putting the contents of any book in the record in this way. It is immaterial and incompetent.

Testimony of Howland Stevenson.

Q. As follows: "On page 157, "In Idaho, a placer having less value than two cents per cubic yard has been worked at a profit.

Q. Now in view of your testimony, would it be your opinion that this property could be worked at two cents per cubic yard?

Mr. AVERY: I object to that because it is not cross examination and immaterial, irrelevant and incompetent, and the question has been answered at least four times.

A. I would not undertake to work that ground at two cents a cubic yard.

Q. I am not asking you that—what do you think about it?

A. I think that it would not pay at two cents per cubic yard.

Q. You don't know anything about the North Bloomfield proposition in California?

Mr. AVERY: I object to that as immaterial.

A. I have heard of it, but not often, I have read it in some of the mining—seen some mining notices of it in some kind of papers, but I don't know anything about it.

Q. You don't know anything about the presence or absence of water there?

A. I don't know anything about it.

Q. It is a placer proposition?

A. Don't even know that.

Q. In view of the following read from the same book on the same page, 157; "The yield of the gravel at North

Testimony of Howland Stevenson.

Bloomfield was 7.7500 cents per cubic yard and the cost of mining 4.10 per cubic yard,—ground carrying 3.99 cents per cubic yard has been worked at a profit on North Bloomfield."

Q. Is your opinion still the same with reference to this?

Mr. AVERY: I object to that on the ground stated in the last question and also upon the ground that it is a hypothetical question with absolutely nothing in the record upon which to base it.

Mr. BLAIR: This witness has stated that this was an ideal placer proposition.

A. Provided there was gold there to mine.

Mr. BLAIR: I know you are anxious to get that in the record as often as you can.

Q. Now have you ever worked a placer, gold placer property?

A. I A. I did once for a short time.

Q. Where?

A. Eastern Oregon.

Q. What was the nature of that?

A. I fell down on it.

Q. What was the nature of it?

A. We built a ditch and started a pipe down and some gravel in the sluice boxes.

Q. How long did you work at it?

A. We worked a good many months building the ditch. I have forgotten how many now. I think we worked on the pipe about fifty days and then the water

Testimony of Howland Stevenson.

gave out and the ground gave out,—that is the gold in the ground gave out.

Q. The gold in the ground gave out?

A. Yes, sir.

Q. Did you ever work any other placer proposition?

A. Not with my own hands.

Q. When you were working up there on this property at Nespelem in August and examining it, were you alone?

A. Yes, sir.

Q. No one with you at all?

A. Not a soul. I only met one man during the whole time I was there.

Q. What was his name, do you know?

A. Hopkins. I think a son of old Vernile F. Hopkins who lives down the river.

Q. You said you stopped at a cabin at that place—any one live in the cabin?

A. Yes, sir.

Q. Who?

A. There was a miner there. I have forgotten the name now, worked for a man named Callahan.

Q. Did you see Callahan himself?

A. Yes, sir.

Q. Talked with him?

A. Yes, sir.

Q. Talked to him about the placer claims?

A. Yes, sir.

Q. What was the drift of his remarks to you?

Mr. AVERY: I object to that and I insist on the ob-

Testimony of Howland Stevenson.

jection as being immaterial, incompetent and irrelevant and heresay and I ask a ruling on that.

Mr. BLAIR: I think that it will come out—you may answer.

Mr. AVERY: Wait a minute. I think there is an objection there for the examiner to pass upon, and I want him to make a decision. This is utterly irrelevant and incompetent and manifestly hearsay.

Mr. BLAIR: I don't want to tell this witness what I want him to testify to although it is something material in this case.

Mr. ADAMS: Do you object to it on the ground that it is impertinent. That is the only ground that I can rule upon.

Mr. AVERY: I object to it on the ground that it is immaterial, incompetent, irrelevant and calling for hearsay evidence and impertinent.

Mr. BLAIR: I will ask another question. I will withdraw that question.

Q. I will ask you, did you have a conversation at that time with Mr. Callahan with reference to the presence or absence of gold on these properties?

A. No, sir.

Q. During these days, the 15th and 16th and 17th and may be the 18th, you said you examined some other properties up there?

A. I think that was the day before I went down on to the lower ground. I went over to look and see where some ledges cross, if any cross, on the river above the falls.

Testimony of Howland Stevenson.

Q. How far above the falls?

A. Up above Callahan's cabin.

Q. Was that with reference to this case?

A. Yes, sir.

Q. What did you find—any ledges crossing?

A. I didn't find anything that interested me in any extent.

Q. Didn't interest you?

A. No, sir.

Q. Why not?

A. Because there was not any there that I saw—some little rock down there in one or two places, but I didn't see any gold in any of them.

Q. Do you know the name of the property?

A. No.

Q. Is it the "double-header"?

A. I know the double-header and I know where that property is and it is way up in the mountains in the other direction, way up west.

Q. How far above the bar was this property?

A. There is several holes along the river up there that and I don't know how many, how far.

Q. A mile?

A. No.

Q. You were there examining that property on the 15th you say?

A. I was examining these properties—the first day I was on this property was the 15th, and the day after that, on the 13th, I walked down from Nespelem all along that flat there down to where the river first breaks

Testimony of Howland Stevenson.

and looked along the bank there to see if there was any ledges crossed.

Q. You were up there the day you started, in your present testimony—when did you start for Spokane?

A. I think I left Spokane on the 12th and on the 14th—if I had a calendar here I could tell you better.

Q. Have your books there?

A. I have not that in the books here, but the day I got down on the property.

Q. What day is that?

A. Aug. 15th was the morning I started on this property, and the day before that would be the 14th.

Q. Yes, that is true.

A. That on the day before in the afternoon I went down along on the bank of the river, to look around, took a cursory look around.

Q. What time of day did you get into Nespelem?

A. In the afternoon some time when the stage arrived. I don't remember. Probably four or five o'clock.

Q. Where did you take the stage from?

A. Almira.

Q. You drove from Wilbur over to Almira?

A. Yes, sir.

Q. Arrived there then the afternoon of the 14th?

A. No, the afternoon of the 13th.

Q. Now you went to Wilbur on what day did you say?

A. On the 12th I left here in the afternoon.

Q. About 2 o'clock?

A. Yes sir,—if I am correct in its being the 12th,

Testimony of Howland Stevenson.

and I think I am, and I got to Wilbur and I got off at Wilbur unwittingly though to take the stage there and I registered at the hotel and found out that the stage run had been transferred so that it didn't leave Wilbur any more, but left Almira, and I went to the livery stable at Wilbur and took a team and they drove me to Almira and I took the stage next day because the next day would be Saturday and otherwise I would have to stay over until Monday and I didn't want to lose that time, so I arrived in Nespelem on the stage leaving Almira on Saturday, I think the 13th,—now whether that is the 13th I cannot say, but I know it was Saturday and I got there on the stage and Sunday afternoon I wandered down the bank of this river and took a look around to see my surroundings and see what I had to do and I started in on Monday, the 15th on these claims.

Q. And you were on the property until the 18th?

A. I am not sure whether I left there on the 18th or not. I might have left Nespelem on the 18th.

Q. That would be in the morning?

A. Yes sir. I know I was there 3 or 4 days.

Q. You stated in your direct examination that you was there five days?

A. I said from 3 to 5 days. I meant the trip.

Q. Do you know how many pans there are in a cubic yard of dirt?

A. Well, that varies.

Q. Well there was an estimate that miners make?

A. They generally estimate from 130 to 160 and there was some dirt—I measured a pan that I was pan-

Testimony of Howland Stevenson.

ning and I made a hundred and sixty-six pans a cubic yard, but I have seen it where it run less than that.

Mr. BLAIR: That is all.

Mr. AVERY: Mr. Stevenson, how many notes have you got there, how many pages of your book does it cover?

Mr. BLAIR: I object to that as absolutely immaterial and irrelevant.

A. Fourteen pages.

Q. Well is that where you noted down the entry of what you did up there on that examination, a complete narrative?

A. A complete narrative from the day I started.

Q. Was it made at that time?

A. It was.

Q. I will ask you then to state with that in view and consulting it just as much as you want to, to state everything that happened on that trip after you reached the ground?

Mr. BLAIR: I object to that as not being proper redirect examination and as having been entered into on his examination in chief and as properly chief examination.

Mr. AVERY: Independent of that if it is not proper redirect examination I will, for the purpose of that question alone, I will ask to recall the witness in order to put that in.

Mr. BLAIR: I object to Mr. Avery asking this question on the ground that he has already gone over the ground covered by the question asked.

Testimony of Howland Stevenson.

A. I started on the 15th.

Q. Just narrate it right through, taking your time.

A. I started on the 15th and made a measurement of the dam and tail race and examined continuously up above the dam where there is an old forge and looked at some holes,—I didn't go up to those holes,—and I then started down this excavation that had been made for—looked as though it had been made for the purpose of putting a flume on there to carry water and on these bars I dug along in there, I took twelve pannings on these different bars. One bar was older than the others and I didn't notice it at first because it laid back and so much trees on it and I took five pans on there. I then followed the river down taking pannings from the different little bars until I came to where the road crosses the river and I followed the road up until I came to where there was a cabin, built out of logs partially and partially out of lumber I think, and it was on the right hand bank of the river, and right near the bank and along that river bank I saw what looked to me what if any place that I had yet seen would carry gold. The side of the bank, the right hand side was quite heavily stained with iron oxide and some black oxide and there had been a number of holes dug in there, small holes. I panned in one or two of those and then took some from the little holes, took some pannings out of those, and the creek being right there I made my pannings there.

There were two old sluice boxes there, one standing up on the bank and one laying down below the bank, kind of up side as it had some—I don't know—it had

Testimony of Howland Stevenson.

one or two places there was little water gullies washed down and coming in there.

I then went along for probably a thousand feet until I came to a great, big, high clay soil bank, a good many—several hundred feet high and underneath that I found three bars. I then went over along the river again. I had not got yet to the mouth of the river, and followed the river clear down to its mouth,—some of the bars—wherever I could find one that was—one that looked at all likely and on the sides of the Nespelem river and took pannings there and panned in different places. I then afterwards, after going over the Nespelem river, or a portion of it, that portion of it, I went back on the flat ground on the Peabody placer and the Wickman placer and I found other pits, some ten I believe in total. Each one of these pits I examined and I wrote a description of it and took pannings there and in none of these pits did I obtain any placer gold.

I then started on this long ditch which ends somewhere near the northwestern corner of the Wickman placer and examined the ditch from where it commences to where it leaves, well, in fact to where it goes away, as far as it goes, where it does. There has been a portion of it washed out and the ditch is destroyed so that it is disconnected with the other ditch from this part and I took pannings along that ditch everywhere that I saw any sand or any gravel.

One place above this cabin that I mentioned up on the line of the ditch, this red oxide stands out there quite prominently and I took two or three pannings

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some cloth of some kind, I have forgotten whether bur-lap or blanket cleated down in it and there was some gravel in that and I gathered up a little there and put it in the pan and washed it, but didn't get anything out of it.

Then I crossed the river there over to an old bar where I found some new clay and some holes, some little holes dug in that and I took stuff out of those holes and then I run on out until I came to the end of the bluff where it dropped down the hill and went down where there was an excavation in the river bed, evidently for the purpose of putting up some kind of building on there. Above that a short distance the ditch started and it run for several hundred feet west along in the soil and brush and along the side of the hill and I followed that out. There I started to take panning in the ditch,—in the bottom of the ditch and in the sides of the ditch and I took a number along there until it run out to a rocky point where it ended. I then dropped from there down to the river bed.

Mr. AVERY: What river?

A. Nespelem river and I went along some ways just up in the canyon there, the river I mean is in a canyon and I went on down to where the river began to be in the flat country and I began to find gravel on the sides of the river bank, on the right hand side going down in one place,—I have a sketch map showing that. I found loose clay soil and some bedrock sticking out there and a lot of sand and gravel along there and I took different pannings along there in different places,

there to be very sure because I suspected gold there if anywhere. The ditch is quite snake like there and runs around and up to the top of another hill and further up on top there is another place where the red oxide sticks out and a little gravel bar there and I panned in that gravel and took them to the river and panned them and didn't get anything. I then examined the river bank on the opposite side and took a number of pannings along there for a distance of several hundred yards I should say, with the same results.

Then I followed the river down some distance examining other places where there was any bars and likelihood to find any gold until I came to a place opposite where the fence of this ranch is on the other side of the river, makes a turn. And from there, I left the river then and went up on the bench land on the Peabody placer and found pits there with gravel, not in the, the gravel was on the sides of the pits, the tops of the pits were caved and I panned in the gravel there and I found—

Mr. BLAIR: I object to all of this.

A. (Cont.) I panned the tops of those pits with no results, and then traveled westerly to the northwesterly end and found some pits,—they were caved and no gravel in them and I took dirt from those pits and put it in a little sack that I had, that I carried for that purpose and I carried them to the river and panned them with no results.

Now I am not giving this in reference to each particular day because I don't remember when I quit and

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went back to town, but I am giving it as I went along;

Mr. AVERY: Does that cover it all?

A. (Cont.) I took my samples to the river in each instance and panned them there and when I got up to the end of this ditch on the third day, or whatever time it was, when I was there that was the end of my trip and I went back to Nespelem and took the stage the next morning and came home.

Mr. BLAIR: I move to strike the answer as mere repetition and for the reason stated in my former objection.

Mr. AVERY:

Q. Did you find any gold whatever in your examination that you have last narrated?

A. Not a single color.

Q. What is your age?

A. 53.

Q. Counsel asked you about your acting as expert for different mining companies. What companies have you acted as expert for?

A. Well I have acted for individuals more than I have for companies, but I have been employed as superintendent by numbers of companies. I acted as expert for the —I don't know the names of the companies, but I have examined, made reports on properties for a great many companies and I could refer generally to them and while I was in Rossland for several years examining properties for anybody that came into the office and doing that kind of work for any one that had it to do, sometimes they were for corporations and some-

Testimony of Howland Stevenson.

times for individuals, I could not recite the different companies that I have made examinations for.

Mr. AVERY: That is all.

Mr. BLAIR: Q. Are you a married man?

A. Yes, sir.

Q. Do you drink?

Mr. AVERY: I object to that as irrelevant and immaterial.

Mr. BLAIR: I want to know whether he had whiskey with him on this trip?

A. I will answer that. I didn't have any whiskey on this trip because it is not allowed there.

Mr. BLAIR: That does not prevent a man having it—I understand he drinks pretty heavily.

I guess that is all.

Mr. AVERY: I have been making an objection, but I will say no more about it.

Mr. BLAIR: It is just a mere matter of examination.

Mr. AVERY: It is stipulated between the parties that the deposition of Mr. Collier need not be read except in argument or by the court and that the only objections imposed to it are those that already appear and have been specifically made.

Mr. AVERY: That is all.

The government rests.

At this point the hearing was adjourned until 2 o'clock P. M. Dec. 18, 1909.

Testimony of Joseph Kroll.

Spokane, Wash. Dec. 18, 1909.

2 o'clock P. M.

Hearing resumed pursuant to adjournment, present all the parties.

Mr. BLAIR: I am going to offer an additional witness.

Mr. JOSEPH KROLL, a witness called by the defendant, was duly sworn.

Mr. AVERY I object to the swearing of this witness and his examination on the ground that it is contrary to the stipulation entered into in regard to this case.

Witness sworn.

Mr. BLAIR: I wish to state before I ask this witness any testimony that the understanding upon which the stipulation was made at the time of the hearing was that it contemplated witnesses whose knowledge of the placers had already been gained and that so far as the understanding of counsel for the defendant is concerned the stipulation was entered into on that understanding. While at that time counsel for the defendant entered into the stipulation in view of the statement made by Mr. Avery, counsel for the complainant, that the testimony of the witness in chief who would be offered by the government, had testimony to give similar to that of Mr. Collier and that it appears that all the testimony given by this witness refers to an examination had since the former hearing in this connection. I think that states what I stated.

Mr. AVERY: The government objects to this witness testifying in this case and to the defendant offering

Testimony of Joseph Kroll.

him as a witness or using his testimony in the case on the ground that it is contrary to a stipulation entered into and of record and that the defendant had rested with the exception of certain evidence or testimony described in the stipulation.

Mr. AVERY: The stipulation, I think counsel is mistaken in the statement or inference that there was no intention of putting on any witness whose knowledge had been acquired or was acquired in any degree after the date of the stipulation was made for the reason of the making of the stipulation was, as I believe counsel will admit, that at the time of that hearing it was brought on rather suddenly at counsel's request, at the request of counsel for defendant because one of his witnesses desired to go home to Michigan. The witness I refer to was Mr. Wickman; that I was unable to have all of the testimony ready in at that time for that hearing so as to let Mr. Wickman leave for home on the first day of the date which the hearing was set down for and therefore desired to get the stipulation which is now in the record.

Mr. BLAIR: You stated that you had just one witness—at the time that that stipulation was made you will recall telling me you had but one witness and of course at that time related as I understood it, at the time of our former conversation, to a witness whose knowledge was already had. This witness is not only in the nature of examination into the case in chief, but also in the nature of rebuttal and that is the reason

Testimony of Joseph Kroll.

I think it is rather unfair to the defendant that we should not be permitted to follow it up.

Mr. AVERY: And in so far as this witness' evidence, the testimony of, Mr. Stevenson, is not on the case in chief, it is offered as in rebuttal, but under the stipulation it is claimed primarily that the evidence of Mr. Stevenson is proper and in accordance with the stipulation.

I will add a further reason for the objection which is that the failure to put in any more rebuttal and to bring any more witnesses in the case in chief were prompted by the fact of the stipulation which was entered into, though not reduced to writing, before the commencement of the taking of any testimony. It now leaves the government in the position of not having prepared itself to combat or impeach or say anything in respect to the evidence of this witness, if it should desire to do so, and particularly that the present United States attorney expects every day to be relieved from his official duties on account of his term having expired and consequently will not be in a position to conduct the case any further or give any one else in a clear manner the status of the case so that it can be consistently concluded or speedily concluded.

Mr. BLAIR: I want to ask something further there. It will be agreed by both parties that since the former taking of testimony in this case that a certain exhibit of the defendant's, viz: exhibit "A", being a small bottle with a nugget of gold therein—

Mr. AVERY: I am perfectly willing that it should

Testimony of Joseph Kroll.

be stated, but I think that the examiner had better make the certificate.

Mr. BLAIR: I want to state this,—“And the nugget of gold therein”.

Mr. AVERY: I will not concede to that. You can go on and make the statement.

Mr. BLAIR: “therein has been lost since being placed in the charge of the clerk of this court” and that another exhibit of the plaintiff’s testified to by the witnesses for the defense which contained black sand and gold has been broken and on account of the foregoing the defendant claims that as a matter of right that he should be permitted to put in testimony somewhat similar in character as that represented by these exhibits.

Mr. AVERY: In respect to which the United States attorney suggests that that is a new ground for putting on a witness and that there cannot be any testimony of this character put in because of the reasons stated inasmuch as these witnesses I assume cannot identify the exhibits referred to as having been lost or broken.

I was going to say, to add this stipulation, that under objections by the government that the witness’ testimony may be presented to the court with the rest of the record and if the court deems that it is properly introduced at this time it may be considered, otherwise it shall not be considered.

Mr. BLAIR: I agree to that.

Mr. AVERY: I might say, of course, that I want my objections throughout the examination to stand.

Testimony of Joseph Kroll.

Mr. BLAIR: I will state here, however, that part of his examination--I didn't directly state it herein before, but a part of it will be in rebuttal to Mr. Stevenson.

By Mr. BLAIR:

Q. State your name?

A. Joseph Kroll.

Q. Where do you live?

A. I live part of the time in Nespelem and part about Coulee City.

Q. You are a rancher at Coulee City, are you?

A. Yes, sir.

Q. On a farm there?

A. Yes, sir.

Q. On a farm there?

A. Yes, sir.

Q. What do you do at Nespelem?

A. I mine.

Q. A miner?

A. Yes, sir.

Q. Own any property there?

A. Yes, sir.

Q. What do you own in the way of property?

A. I have got three quartz claims.

Q. How long have you been acquainted with the Nespelem country?

A. Ever since 1898.

Q. 1898?

A. Yes, sir.

Q. How long have you been a miner?

A. Ever since 1880.

Testimony of Joseph Kroll.

Q. Where have you had mining experience?

A. Wyoming, Montana, Idaho, and the last eleven years in Washington.

Q. The last 11 years in Washington, and where?

A. On the south half of the Colville reservation.

Q. What we call the Nespelem country?

A. Yes, sir.

Q. Have you ever had any placer experience?

A. Yes, sir.

Q. Experience with gold placers?

A. Yes, sir.

Q. Where?

A. Wyoming and some in Montana and I prospected a good deal on the south half of the Colville reservation.

Q. When did you first go to the Nespelem country?

A. October 1, 1898.

Q. October 1, 1898?

A. Yes, sir.

Q. Are you acquainted with the Wickman and Peabody placers?

A. Yes, sir.

Q. You are acquainted with their locations with reference to the Nespelem and Columbia rivers?

A. Yes, sir.

Q. Now when did you first see the ground that is now covered by the Wickman and Peabody placers?

A. Oh some couple of years ago or such a matter.

Q. When did you first see it the first time?

A. We were panning that ground—we panned there.

Q. How is that?

Testimony of Joseph Kroll.

A. Last October.

Q. I say when were you first there?

A. Before the claim was there?

Q. Yes, sir?

A. It was Oct. 15, 1898.

Q. Oct. 15, 1898?

A. Yes, sir.

Q. Now state what you were doing at that time?

A. I was prospecting.

Q. How is that?

A. Prospecting.

Q. Where did you prospect—did you prospect the Columbia river at that time?

A. Yes, sir.

Q. Where?

A. On the Columbia right at the mouth of the Nespelem.

Q. Right at the mouth of the Nespelem?

A. Yes, sir.

Q. And did you prospect up the Columbia river?

A. Yes, sir.

Q. How far?

A. I prospected about two miles below the mouth of the Nespelem and up the Columbia river to the mouth of the San Poil and up the San Poil about 30 miles—to the Thirty Mile on account of its being 30 miles from the mouth of the San Poil.

Q. Were you panning?

A. Yes, sir.

Q. For gold?

Testimony of Joseph Kroll.

A. Yes, sir.

Q. Did you find any gold along the Columbia?

Mr. AVERY: I object to that as incompetent, irrelevant and immaterial.

A. Yes, sir.

Mr. AVERY: I has nothing to do with the issues here.

Q. The Columbia as you have described it, that part of the Columbia as you have described it about the mouth of the Nespelem—is up the river from the Nespelem river?

A. No, some above and some below.

Q. Some 30 miles above is it not?

A. Yes, sir.

Q. Did you at that time do any panning around the property involved in this case?

A. Yes, sir.

Q. State where you panned at this time on this property?

A. I panned along the Nespelem river from the falls down to the mouth and found good results.

Mr. AVERY: I object to that as not responsive.

A. I panned.

Mr. AVERY: I move to strike it out as being a conclusion of the witness.

Q. You panned you say from the falls down to the mouth of the Nespelem?

A. Yes, sir.

Q. Do not say anything about results now, but just state where you panned on the property there.

Testimony of Joseph Kroll.

A. I panned down the Columbia river.

Q. Past this property?

A. Yes, sir.

Q. Did you pan any on the margin of the property along the river?

A. Yes, sir.

Q. That is, along the Columbia river bank?

A. Yes, sir.

Q. Now state with what result—state if you found anything in the Nespelem river from the falls down to the mouth?

A. I found good results.

Mr. AVERY: I object and move to strike it out as being a conclusion of the witness.

Q. What do you mean by good results?

A. I found gold colors.

Q. How long were you panning there at that time?

A. I was there from October 15 to November 11th.

Q. That is on that property?

A. Yes—though I didn't pan every day.

Q. Can you state approximately the average amount of colors that you found in your panning along the Nespelem at that time—you don't need to state the exact number but state if you can recall the average number of colors you found?

A. I panned from 1 to 20 though I didn't count them every pan because I didn't think it was worth while.

Mr. AVERY: Didn't think it was what?

A. I didn't count the colors, simply they were there and I didn't count them. It is not customary to count

Testimony of Joseph Kroll.

them every time, but I found from 1 to 18 colors or flour gold at that time.

Q. I call your attention to complainant's exhibit No. 4 and call your attention to the excluded strip between the Wickman placer and the Columbia river. Did you pan along that margin?

A. Yes, sir.

Q. What did you find there—did you find any gold?

A. Yes, sir.

Q. How is that?

A. Yes, sir.

Q. For what purpose were you panning there, Mr. Kroll?

A. My intention was to find gold there and make a location.

Q. On that property?

A. Yes, sir.

Q. Did you locate on the property?

Mr. AVERY: I object to that as incompetent, irrelevant and immaterial.

A. Yes, sir.

Q. Did you locate on this property?

Mr. AVERY: I make the same objection, and in addition it is not the best evidence.

A. Yes.

Q. What date?

Mr. AVERY: I object to that.

A. The 13th, 14th and 15th. I made three locations on three days.

Q. What are the names of the locations?

Testimony of Joseph Kroll.

Mr. AVERY: I make the same objection.

A. Sunrise, Monday and Ditto.

Q. When did you make those locations?

A. On July 13th, 14th and 15th, 1898.

Q. I call your attention to the memorandum there, Mr. Kroll, was it October or July?

A. October, I was looking at the end of the book.

Q. You have in your hand a book, Mr. Kroll, what is that?

A. That is my diary.

Q. When were those entries made in that book?

Mr. AVERY: If he is going to testify from the book I would like to see it.

A. In 1898.

Q. I call your attention, Mr. Kroll, to the date which is opposite the Sunrise placer and ask you whether that is the 15th or 13th. I cannot tell myself?

A. The 13th.

Q. Well then you were there upon the property before the 15th?

A. Yes, sir.

Q. Aside from that book would you have a recollection of the dates upon which you were there?

A. No, I would not.

Q. But with your recollection refreshed by that book you know that you were there at the times stated in the book?

A. Yes, sir.

Q. Did you work these locations?

A. No, sir.

Testimony of Joseph Kroll.

Q. Why not?

A. I have not had the means.

Q. Did you attempt to get the means?

A. Yes, sir.

Mr. AVERY: I object to that as being absolutely immaterial.

Q. To whom did you apply?

Mr. AVERY: The same objection.

A. I went to Keller and applied to Farr Brothers.

Q. Did they assist you?

A. No, sir.

Mr. AVERY: I am willing to concede that he could not get the help.

Q. For what reason did they not help you?

Mr. AVERY: I object to that as a conclusion and hearsay evidence and immaterial and irrelevant.

Q. What reason did Farr Bros. give you for not helping you?

Mr. AVERY: That calls for hearsay evidence and absolutely incompetent.

Mr. BLAIR: I wish to state in the record that the reason why a man does a thing is always shown by his statements.

Mr. AVERY: But not the reason why someone else does not do a thing.

Mr. BLAIR: That is just exactly it.

Q. You may state.

A. They had a store in the town of Keller and they also had pretty near 38 quartz claims located in the Manila district.

Testimony of Joseph Kroll.

Q. Did you collect any gold at that time?

A. Yes, sir.

Mr. AVERY: I object to that unless it came from these claims.

A. Yes, sir.

Q. How many pannings did that gold represent?

A. I could not state as to that.

Q. It didn't represent the total pannings while you were there?

A. No, sir.

Q. Now you have panned along the Columbia you have stated?

A. Yes, sir.

Q. Near the Wickman placer?

A. Yes, sir.

Q. What is the fact with reference to the kinds of gold found on the Nespelem river and on the Columbia river relatively?

Mr. AVERY: I object to that as irrelevant, incompetent and immaterial.

Q. You may answer.

A. The Nespelem river is coarser than the Columbia river. The Columbia river gold is very very fine, what we call flour gold.

Q. Where did you locate these claims on this property with reference to the Nespelem river?

Mr. AVERY: I object to that, he said he located these claims and he could not locate them anywhere else:

Mr. BLAIR: I think that they did not cover the

Testimony of Joseph Kroll.

whole property, is my idea—he didn't locate all of this.

Q. You located 3 claims?

A. Yes, sir.

Q. And where were they with relation to the river, the Nespelem river?

A. On the south side—on the northwest side of the Nespelem river, butted against the Nespelem river and run in a northwesterly direction.

Q. Have you ever panned there since?

A. Yes, sir.

Q. When was that?

A. Last October.

Q. Of this year?

A. Yes, sir.

Q. How many pannings did you pan at that time?

A. About 8 pans.

Q. Where did you pan them?

A. Down the Nespelem and Columbia rivers.

Q. Do you remember approximately how many you made on the Nespelem?

A. I got about 5 on the Nespelem and 3 down the Columbia river.

Q. Did you find any gold in those pans?

A. Yes, sir.

Q. From what point on the stream, the Nespelem river did you take your pans?

A. What?

Mr. BLAIR: I withdraw the question.

Q. What point on the Columbia river did you pan at that time, that is in October?

Testimony of Joseph Kroll.

A. From the mouth of the Nespelem—from the Nespelem river where the two banks comes in down the river probably for a quarter of a mile.

Q. And where on the Nespelem river did you pan last October?

A. I panned there on the wagon road across the river, from where the wagon road crosses the river down to its mouth.

Q. Did you find gravel all these places?

A. Yes, sir.

Q. And what showing of gold did you find if any in these pans—what did you find in the way of gold if any?

A. I found gold colors.

Q. On the Nespelem river?

A. Yes, sir.

Q. Any on the Columbia?

A. Yes, sir.

Q. Of those 8 pans, how many bore gold would you say?

A. Five or six—I know I got some blanks, what we call blanks, 2 or 3 pans didn't get nothing.

Q. How did these colors average up in point of numbers?

A. What?

Q. How did these colors average up in point of number of colors?

Mr. AVERY: I object to that as not being understandable.

A. From 1 to 6?

Q. From one to six colors?

Testimony of Joseph Kroll.

A. Six was the biggest result, that is on the Nespelem. On the Columbia river the gold was so fine I could not count them.

Q. I call your attention to defendant's exhibit "U" for identification, and ask you if you know what that it?

A. Yes, sir.

Q. What is it?

A. It is gold.

Q. Gold any anything else?

A. Black sand.

Q. What does that represent?

A. The amount of gold?

Q. No, is that the gold that you panned?

A. Yes, sir.

Q. In those five or six pans?

A. Yes, sir.

Mr. AVERY: I think I will ask you to let the witness tell, how many pans that came out.

Mr. BLAIR: He says 2 or 3 were blanks so I just subtracted for him.

Mr. BLAIR: I offer this defendant's exhibit "U" for identification in evidence.

Mr. AVERY: I object to that for the reasons heretofore stated in respect to this witness and also for the reason it is incompetent, irrelevant and immaterial and not sufficiently identified in respect to these claims.

Q. Taking the colors represented in this defendant's exhibit "U" can you state approximately how many colors of the average size contained herein would make a cent?

Testimony of Joseph Kroll.

Mr. AVERY: I object to that as incompetent and immaterial and the witness has not shown himself qualified to answer and it is not susceptible of being answered.

Q. You may answer.

A. About 45 colors.

Q. It takes more of the Columbia river gold than of the Nespelem gold does it not?

A. Yes, sir.

Q. You heard the testimony this morning, Mr. Kroll, of Mr. Stevenson?

A. Yes, sir.

Q. With reference to the agricultural character of this land on the Wickman and Peabody placers?

A. Yes, sir.

Q. State if you know the character of the land so far as its agricultural properties are concerned?

A. In 1898 that was located by a halfbreed.

Mr. AVERY: I object to that as not being the best evidence of a location and incompetent and immaterial.

Q. By what?

A. A halfbreed.

Q. Has it been farmed?

A. Yes, sir.

Q. With what result?

A. Nothing.

Q. Is it farmed now?

A. No, sir.

Q. Now what about other agricultural lands, that piece called the Condon field—about how many acres in that do you know?

Testimony of Joseph Kroll.

A. Over 100 acres.

Q. That is considerable higher is it than these claims?

A. Yes, sir.

Q. Is that farmed at the present time?

A. A small portion of it.

Q. How much?

A. Probably 40 acres.

Q. What is grown on it?

A. He tried to raise grain, but didn't raise it.

Q. Is there any other agricultural land lying near this property?

A. No, sir.

Q. Any across the river?

A. A long ways across the river.

Q. How far?

A. You mean across the Nespelem?

Q. Across the Columbia?

A. Probably 5 or 6 miles.

Mr. AVERY: I object to that as irrelevant and immaterial.

Q. You have had experience as a miner?

A. Yes, sir.

Q. Do you know where gold is most frequently found—most frequently found?

A. Yes, sir.

Q. The character of the soil and so on?

A. Yes, sir.

Q. You heard the testimony of Mr. Stevenson this morning?

Testimony of Joseph Kroll.

A. Yes, sir.

Q. From your knowledge of the Nespelem and the frequency of gold therein, is it possible that a man could pan down the Nespelem river with the result testified to by Mr. Stevenson?

Mr. AVERY: I object to that as calling for the witness' conclusion as to what Mr. Stevenson has testified to and as no proper foundation upon which to base an answer.

Q. You may answer.

A. It is almost impossible for a man to pan down the Nespelem river without finding colors.

Q. Unless he endeavored to do so?

Mr. AVERY: I object to that as leading in addition to all the other objections I have made.

Q. From your experience in panning on the river, if a miner, if one having reasonable experience in panning started at the mouth and made a fairly good examination of the sands of the river and lying along the river, would it be possible to avoid finding gold, to fail to find gold?

Mr. AVERY: I object to that as not being in competent and not being a proper question. It is indefinite.

Q. You may answer.

A. They could possibly be, but the margin is very small. A man could possibly pan twelve pans and miss it if he would take from the top gravel where the water recently made the bar at the present time—the gold is not on top of the bar, it is down in the bottom.

Q. And generally speaking from your knowledge does

Testimony of Joseph Kroll.

or does not the soil along the Nespelem bear gold in its gravel deposits?

Mr. Avery: I object to that as not sufficiently definite and calls for a conclusion and without a proper foundation for the conclusion. It is incompetent.

Q. You may answer.

A. Yes, sir.

Q. That is according to your knowledge?

A. Yes, sir.

Q. In your pannings on the Nespelem river in October of 1898?

A. Yes, sir.

Q. I think you testified?—

A. Yes, sir.

Q. I may have forgotten—did you testify that you—from what point up near the falls if you did, did you pan. Did you start with the falls. I don't recall what your testimony was?

A. About 100 yards below the falls.

Q. Down to the mouth?

A. Yes, sir.

CROSS EXAMINATION.

By Mr. AVERY:

Q. Where do you live now, Mr. Kroll?

A. I live 8 miles from Coulee City.

Q. How long have you lived there?

A. Three years I have lived there.

Q. What were you doing over on these claims last October?

A. I went over to prospect.

Testimony of Joseph Kroll.

Q. Who asked you to go?

A. The Multnomah Mining Co.

Q. Did you ever work for them?

A. I worked some for them, yes sir.

Q. When did you work for them?

A. About a year ago.

Q. How long did you work for them?

A. Oh about 3 weeks.

Q. Where did you work for them—in their lode mines up there?

A. Yes, sir.

Q. What did you do?

A. I done the blasting on the work, rock work.

Q. Who were with you when you went on these claims in October last?

A. I was alone.

Q. How long were you there?

A. Probably 3 hours.

Q. You went from where?

A. Went from my cabin.

Q. Where is your cabin?

A. About 6 miles up the Nespelem river north, due north from the mouth of the Nespelem.

Q. How did you happen to be at your cabin at that time—is that where you lived then?

A. Yes, sir.

Q. Are you married?

A. Yes, sir.

Q. Did some one come there and ask you to go down?

A. Yes, sir.

Testimony of Joseph Kroll.

Q. Who, Dr. Hudnutt?

A. Yes, sir.

Q. Where did he ask you?

A. He told me that he was pretty near losing the ground and in conversation I told him that—

Q. I want to know if he came there to your house and asked you to go down?

A. He didn't come to the house. We met down at Nespelem at the post office.

Q. And he told you that they were contesting the ground on account of the fact that there was no gold on it?

A. Yes, sir.

Q. And he told you to go down there and see if you could find gold?

A. I told him I knew there was some and he says I want you to go down and see whether there is any there yet.

Q. And you went down there with the object of finding gold if there was any there?

A. To see whether there was still any there.

Q. You confined your operations to the Nespelem river?

A. Yes, sir.

Q. You did not go up on the Wickman claim?

A. Yes sir, and even the Columbia river.

Q. I mean the Wickman claim itself?

A. I know that there is no gold on top in the grass roots. I did not prospect the surface down on top of the bench.

Testimony of Joseph Kroll.

Q. You know where the Wickman claim is, don't you?

A. Yes, sir.

Q. You mean by that that the place to look for gold on the Wickman claim would not be on the top surface here?

A. No, sir.

Q. You didn't think you could find any gold up here?

A. No, sir.

Q. You didn't think you could find any gold anywhere on the Wickman claim by ordinary methods or digging holes except to begin down on the strip below the Wickman claim, between the Wickman claim and the river?

Mr. BLAIR: I move to strike the last two questions on the ground because they call for a mere conclusion of the witness without reference to his knowledge.

A. No, sir.

Q. That is, that the only place that you from your examination thought that you could find gold on the Wickman claim would be down below the claim and between it and the Columbia river?

A. Yes, sir.

Q. On what we call the excluded strip?

A. Yes sir. There was a gulch or two run into the Wickman claim and I went in those gulches.

Q. You didn't pan up on the claim?

A. I did not run this line (indicating) so I might have been on the claim. I was along in here somewhere (Indicating), I went up a couple of gulches and panned

Testimony of Joseph Kroll.

and got results, though I did not run this line from corner No. 3 to corner No. 4 of the Wickman.

Q. That is 1500 feet?

A. Yes, sir.

Q. You don't know whether your investigation run up on it or not?

A. No.

Q. You didn't pan along this ditch on the upper part of the Wickman?

A. It would not be any use.

Q. You mean by that that you could not find any gold up there?

A. No.

Q. How deep would you think you would have to go for gold on the Wickman claim if there was any gold there?

Mr. BLAIR: I object to the question as calling for a mere guess upon the part of the witness and as not cross examination of any matter that has been entered into by the defendant.

A. Down to bedrock.

Q. And you could not get any gold by digging upon the surface of the Wickman claim before you struck bedrock?

A. No, sir.

Q. Do you know where bedrock is on the Wickman claim?

A. I do know where it runs down to the Columbia river.

Testimony of Joseph Kroll.

Q. You know where it is on the Columbia river, but you don't know where it is on the Wickman claim?

A. I do not.

Q. When did you say you were first on these claims?

A. On the ground?

Q. Yes, sir.

A. Oct. 13, 1898.

Q. Didn't you state in your direct examination that it was Oct. 15, 1898?

A. The 13th, 14th and 15th.

Q. What were you doing?

A. I made them three claims.

Q. What?

A. Made locations of the three claims.

Q. When did you first go on the ground, that is, the first time?

A. Oct. 1st.

Q. That is the first time you went on the ground, October 1st?

A. Yes, sir.

Q. Were you alone?

A. Yes, sir.

Q. Did you stay on the ground?

A. Yes, sir.

Q. I mean did you stay there at the mouth of the Nespelem?

A. Yes, sir.

Q. Where did you do any panning on the trip?

A. I panned along down the Nespelem and down the

Testimony of Joseph Kroll.

Columbia river about two miles, between 2 and 3 miles down the river below the mouth of the Nespelem.

Q. But you did not pan on these claims except on the Nespelem river?

A. Yes, I did first before I found the difference.

Q. What do you mean by "before I found the difference"?

A. I didn't know the character of the deposits. Where there is a glazier deposit, or a gorge shoved out—I say a gorge shoved the gold out of the rock here and pushed it out on the banks it would be laying on top.

Q. Where did you locate your 3 claims. Look at exhibit No. 4 and tell me where you located your claims.

A. I butted them against the Nespelem and run them straight in that direction (indicating). There is the falls and the dam. I started as near as I can,—them bushes don't show. There is some bushes here back there and I think I started in there somewhere (indicating).

Q. They all butted on the Nespelem river?

A. Yes sir, and run out straight from there.

Q. Run out north?

A. Yes, sir.

Q. Now how many colors do you think you got at that time when you panned down the river?

A. Last October?

Q. No, in 1898?

A. Well, I never counted the colors.

Q. You do not remember precisely what you did find, do you?

Testimony of Joseph Kroll.

A. I could find gold, actually there was a string in the pan probably six inches of this flour gold—it is just like flour and you can see a yellow streak, but you can not count the colors.

Q. They were too small to count with the eye?

A. Too small to count.

Q. Now hydraulicking does not save that kind of gold does it?

A. Yes, sir.

Q. Don't it blow it away?

A. No sir, they have got the copper plate machinery now at the bottom of the last riffle to save all of that fine gold.

Q. Now when you were there you panned also on the Columbia on that trip, didn't you?

A. Yes, sir.

Q. Did you do this panning before or after you located the claims?

A. Before.

Q. How long before?

A. Oh half a day or such a matter.

Q. Half a day?

A. Yes, sir.

Q. Then you stayed on the claims you said from Oct. 15th how long—to Nov. 11th?

A. Nov. 11th.

Q. And were you there alone during that period?

A. Yes, sir.

Q. What were you doing there?

A. I was camping there with my horses.

Testimony of Joseph Kroll.

Q. Just simply camped there during that period?

A. Yes, sir.

Q. Didn't do any more mining?

A. Yes, I done some prospecting.

Q. Where?

A. On the claims that I located, and also rode up into the hills looking for quartz claims.

Q. Your principal occupation after you had located the claims was going up into the hills for quartz, wasn't it?

A. Well sometimes when the horses was close to camp I would take a horse and ride around and look for quartz, but if the horses wandered off quite a ways, wasn't in sight, I panned on my locations.

Q. You afterwards abandoned these claims?

A. Yes, sir.

Q. Will you let me take that book you are reading from, or rather not reading from, but you have been referring to it.

(Witness hands over book)

Q. I see that you have got a long list of names here kept about in the same manner as you have put in the Sunrise, Monday and Ditto. You have got a string of names, Troy Lode, Maybe Lode, Hope Placer, Olive Placer, Occidental Placer, Sunrise Placer, Monday Placer, Ditto Placer, Grandview Lode, Short Lode, Grand Coulee Lode, Iron Crown Lode and Libby Lode. You made all those locations there at that time?

A. Yes, sir.

Testimony of Joseph Kroll.

Q. The Occidental, Sunrise, Monday and Ditto—the Occidental was made the first of October, wasn't it?

A. Yes, sir.

Q. And the Sunrise the 13th?

A. Yes, sir.

Q. The Monday on the 13th?

A. Yes, sir.

Q. The Ditto on the 13th?

A. Yes, sir.

Q. And Grandview on the 15th of October?

A. Yes, sir.

Q. Spot on the 26th of October?

A. Yes, sir.

Q. And Grand Coulee on the 26th of October?

A. Yes, sir.

Q. The Iron Crown and Libby on the 5th of November, that is right isn't it?

A. Yes sir—that might be the 11th.

Q. Did you abandon them all?

A. No, sir.

Q. You kept some of them, did you?

A. Yes, sir.

Q. Which ones did you abandon?

A. The Iron Crown Lode and Spot.

Q. Where were they?

A. They are at the mouth, about 6 miles from the mouth of the Nespelem.

Q. They are lode claims?

A. Yes, sir.

Q. You abandoned all these placer claims?

Testimony of Joseph Kroll.

A. Yes, sir.

Q. I don't know whether I named the Spot in reading them, in reading the last few, but there was such a name as that lode located?

A. Sir—I will say this I relocated them afterwards, the claims and renamed them since.

Q. And have them yet?

A. Yes, sir.

Q. Now where were those claims, other than the Sunrise, Monday and Ditto?

A. The Troy Lode was about two miles west from Keller and the Maybe Lode was joined with the Troy Lode. The Hope Placer and the Olive Placer was at the mouth of the Iron creek on the San Poil river and the Occidental was a lode about three miles below the mouth of the Nespelem river running down to the bottom of the Columbia river, and the Grandview and Spot was about six miles from the mouth of the Nespelem in a northerly direction and the Grand Coulee and Iron Crown Lodes are also there, there was a group, but I abandoned all but the three, after I prospected and knew then that it was not worth while to work in there, I abandoned all the groups but them three.

Q. Whereabouts on the Nespelem river did you pan last October?

A. I panned about 100 yards below the falls, the lower falls of the Nespelem river down at the mouth of the Nespelem river.

Q. How many places?

A. About 5.

Testimony of Joseph Kroll.

Q. And then your other panning was on the Columbia down below the claims?

A. Yes, sir.

Q. You say you found colors in every one, did you say on the Nespelem?

A. Yes, sir.

Q. But some of the pans were blank?

A. There was three blanks. I don't exactly remember. I think they were all on the Nespelem.

Q. Well these colors that you found on the Nespelem, were they very fine ones were they not, fine flour colors, flour gold?

A. No, they was bigger than the Columbia river colors.

Q. But the Columbia river is very fine?

A. Very fine flour gold.

Q. Could you see these colors with the naked eye that you found on the Nespelem?

A. Yes, sir.

Q. If you had panned down the Nespelem and hadn't found any colors at all in the pans that you took down there you would not consider it valuable as placer ground, would you?

A. No, sir.

Q. And because you found some gold down there you do not mean to say that you now consider it valuable as a placer mine?

A. Yes, sir.

Q. What do you mean by "valuable as a placer mine"?

Testimony of Joseph Kroll.

A. I mean when all circumstances in favor of the locality, dumping ground and water.

Q. Where is the dumping ground you refer to?

A. Down to the Columbia river.

Q. You think you can dump in the Columbia river, do you?

A. The space.

You would not have to—the space is 300 or 400 feet from the low water mark to the high water mark on the Columbia river.

Q. You think you have a right to dump in there, do you?

A. Yes, sir.

Q. Do you think you have a right to dump in the river?

A. This is not in the river.

Q. Now referring to defendant's exhibit "U", how many pans did you say that came out of?

A. Eight pans and three was blank, consequently there was five pans that that came out of.

Q. Did any of this come from the Columbia river?

A. A part of it and part from the Nespelem, five from the Nespelem and three from the Columbia.

Q. Then some of this came out of the Columbia river, did it?

A. Yes sir, about 3 pans.

Q. You don't know what part of it, do you?

A. What part?

Q. You don't know how much of the gold in this bottle if there is any gold?

Testimony of Joseph Kroll.

A. Yes, I can pick out every color there belonging to the Columbia river and to the Nespelem river if I had them in a pan.

Q. If you had them in a pan.

A. Yes, sir.

Q. But now you can not, bottled up in this shape?

A. No, you can not distinguish them.

Q. How much is the value of the gold in the bottle do you say or did you testify?

A. About half a cent.

Q. You think there is a half a cent of gold in the bottle do you?

A. Yes, sir.

Q. You said it was almost impossible you thought to pan down the river and not find gold. You mean by that that it is possible, you may pan down the river and not find any gold?

A. There is a possibility, but I could not pan down there without finding something.

Q. How many colors are there in this bottle, Exhibit "U"?

A. Somewhere between 30 and 50 colors.

Q. You say there are in here between 30 and 50 colors?

A. Yes, sir.

Q. And you think that that would make half a cent, somewhere near that?

A. Yes, sir.

Q. Well, you testified in your direct examination that 45 colors would make a cent?

Testimony of Joseph Kroll.

A. Yes, sir.

Q. What do you mean by that?

A. That depends on what colors, on what the size of the colors are.

Q. Do you call those colors in this exhibit "U" big or little?

A. Sir?

Q. Are those large colors in this exhibit "U" or small colors?

A. Small colors.

Q. You say small?

A. Yes, sir.

Q. Did you bottle them up?

A. Sir?

Q. Did you put them in this bottle?

A. Yes, sir.

Q. When?

A. Well it was about the next day after I prospected last October.

Q. Have you had them ever since?

A. Yes, sir.

Q. Has anybody else had them?

A. No, sir.

Q. When did you abandon these claims?

Mr. BLAIR: Referring now to the placer claims?

Mr. AVERY: Referring to these claims that were located where he says the Wickman and Peabody are?

Q. Don't you know about when it was, Mr. Kroll, I don't care to know the precise date?

A. About the 21st of June, 1898 when I quit.

Testimony of Joseph Kroll.

Q. You hadn't located them until that?

A. No sir. I located them in 1898 and I abandoned them in 1899.

Q. What?

A. I abandoned them in June 1899.

Q. Where were you between Oct. 15th 1898 and June 1899?

A. I was along the Nespelem river and also the San Poil river.

Q. Locating claims?

A. Prospecting.

Q. And you located a good many claims up in that locality?

A. Yes, sir.

Q. All of them you abandoned except three?

A. After it was determined that they were not worth working further why I abandoned them.

Q. Did you locate any more claims than those mentioned in the book there?

A. Yes, sir.

Q. What other claims did you locate—got another list have you?

A. Scattered all through now. I located the Jesse claim on July 12, 1899.

Q. What is the next one?

Mr. BLAIR: I object to this question of course as being immaterial.

A. The New York on July 26, 1899.

Q. What other?

A. The Nellie.

Testimony of Joseph Kroll.

Mr. BLAIR: I object to all this.

A. No date.

Q. What else?

A. The Wall Street, July 26, 1899.

Q. What else?

A. The Ingersoll on September 15, 1899.

Mr. BLAIR: I object to all these questions as being immaterial and irrelevant.

A. The Argus on Sept. 14, 1899.

Q. What else?

A. The Argus No. 2 on Sept. 25, 1899.

Q. What else—just give me—I will not go any further if you will tell me how many there were, the number of them without giving their names?

A. Oh there might be 8 or 10 more.

Q. None of them were in close to these Wickman and Peabody were they?

A. The majority was within 5 or 6 miles.

Q. I mean none of them were immediately there?

A. No, sir.

Q. Around there?

A. No, sir.

Q. When you located this ground that you say is now occupied by the Wickman and Peabody placers, or part of the ground, did it occur to you that there was pretty good water power right there—did it occur to you when you located the Monday, the Sunrise and Ditto placers that there was pretty good water power right there?

Testimony of Joseph Kroll.

Q. That was one of your reasons for locating it, wasn't it?

A. Yes, sir.

Q. And if there was any gold there that would be the most advantageous place of any that you located, wouldn't it?

A. Yes, sir.

Q. I mean because of the water?

A. Yes, sir.

Q. Now referring to the agricultural land around there, you say that there is agricultural land around there, isn't there more or less?

A. Up the river, up above the mouth of the Nespelem there is.

Q. How about the Wickman and Peabody if water was put on them, up from the river I mean, it is on a bench up there, isn't it?

A. Yes, sir.

Q. The upper part of the Wickman and Peabody is kind of bench land?

A. Yes, sir.

Q. Water put on that would raise agricultural products, wouldn't it?

A. Too coarse and sandy.

Q. What is that?

A. Too coarse and sandy.

Q. You don't think you could raise anything on there?

A. No, sir.

Q. How about the country—isn't there some nice agri-

Testimony of Joseph Kroll.

cultural country between there and Nespelem—between these claims and Nespelem?

A. I don't understand you.

Q. What is that?

A. I don't understand the question.

Q. Is there any agricultural country between Nespelem town—

A. The town?

Q. And these claims?

A. Yes, sir.

Q. There is, isn't there?

A. Yes, sir.

Q. That ground would raise fruit and grains with irrigation?

A. They don't raise any fruit there.

Q. I know, they don't raise fruit in a good many places where they can raise it?

A. They raise gardens there.

Q. Garden truck?

A. Yes, sir.

Q. And use water to do it?

A. In some places they are using it to advantage.

Q. It is better with water of course than without?

A. Yes, sir.

Q. Where are these places you refer to, between Nespelem and these claims?

A. No sir, they are at the Berry Ferry, 10 miles up the Columbia river from the mouth of the Nespelem.

Q. I am referring particularly to the land between Nespelem and the claims?

Testimony of Joseph Kroll.

A. They don't irrigate.

Q. Don't they have to?

A. No, sir.

Q. Wouldn't it make it any better if they irrigated it?

A. Yes, sir.

Q. Now you say there is an Indian claim or ranch right east of these claims?

A. Up the Columbia river.

Q. That is up the river?

A. Southeast.

Q. Not very far is it?

A. Oh it joins.

Q. It joins these claims, doesn't it?

A. Yes sir, they have a fence around it, the agricultural land, they have got a fence around a good deal more, for pasture.

Q. And went a lot further?

A. Yes, sir.

Q. Well he pastures in there, does he?

A. Yes, sir.

Q. What kind of grass is the pasture grass?

A. Kind of sheep grass.

Q. Sheep grass on these claims, isn't it?

A. Yes, sir.

Q. You have seen them pasturing on them, haven't you?

A. There is stock running around loose.

Q. And they graze on this Wickman and Peabody claims?

A. Yes, sir.

Testimony of Joseph Kroll.

Q. About the same kind of grass as it is on this Indian claim east?

A. Well not as good.

Q. Not as good as the Indian claim?

A. No.

Q. What is the nature of the soil on this Indian claim? that bounds these claims, the Indian lot that bounds these placer claims on the east—what is the kind of soil?

A. There is a spring up above there and some black soil by the spring close to his house.

Q. Do they use any water over there?

A. Yes, sir.

Mr. BLAIR: You mean water to irrigate?

Mr. AVERY: Yes.

A. No, he don't. He had enough water, he got his spring—enough for his own use.

By Mr. AVERY: That is all.

REDIRECT EXAMINATION.

By Mr. BLAIR:

Q. When you located the Sunrise, Monday and Ditto claims did you do any panning on the property?

A. Yes, sir.

Q. Now you stated that you abandoned these lode claims and the placer claims. Why did you abandon the placer claims?

Mr. AVERY: I object to that as he has already stated both on direct examination and on cross examination.

Q. You may answer.

A. I found in order to get that water out of the Nes-

Testimony of Joseph Kroll.

pelem, after examining the ground that I had to get this water out through a hard granite point, and there I quit.

Q. Why did you quit?

A. Because I was not able to blast. I could not connect—with assistance probably I could have gone in and dug a ditch in the soil, but we could not afford to blast in the hard granite.

Q. Too expensive?

Mr. AVERY: I object to that as leading?

A. Yes, sir.

Q. In regard to the Wickman and Peabody placers state if you know what the fact is with reference to the surface of these placers being or not being cut with coulees and ravines?

A. Well they are cut by gullies.

Q. This garden truck that you say is grown around Nespelem, in what quantity is it grown by any of those people up there, just for their own sole use?

A. Very little.

Q. This coarse grass or whatever it is you say is on the Wickman and Peabody, is it green grass?

A. It is green grass when it first comes up in the spring, but after a month it is dry.

Q. What is it the rest of the time?

A. Well the time it is ready to dry it is all gone, dries away.

Mr. BLAIR: That is all.

By Mr. AVERY:

Q. How much time does it take to locate a claim?

Testimony of Joseph Kroll.

A. Well it took me a week to locate the Occidental claim. There was a cliff about 50 feet right straight up.

Q. How long did it take you to locate the three claims, the Ditto, Sunrise and Monday?

A. Oh less than half a day if I was to work right along.

Q. All of those other claims of these two or three dozen that you located, did you abandon them because you had to blast granite to get the water?

Mr. BLAIR: I object to that because of the incorrect assumption made in the question. The witness cannot fairly answer the question because he did not testify about two or three odd dozen.

Q. You may answer.

A. That is sort of impossible to answer that question—the question in reference to the lode claims. I have abandoned the placer claims on account of the water.

Q. You what?

A. I abandoned the three placer claims on account of I could not get the water on them to work them.

Q. Well you knew how hard it would be to get water when you located this Ditto, Monday and Sunrise, didn't you?

A. I didn't take notice of the granite cliffs.

Mr. AVERY: That is all.

Mr. BLAIR: That is all.

Witness excused.

No. 1317

In the United States Circuit Court for the Eastern District of Washington, Eastern Division.

UNITED STATES OF AMERICA,

Complainant,

vs.

MULTNOMAH MINING, MILLING AND DEVELOPMENT COMPANY, a corporation,

Defendant.

United States of America.

State of Washington.

County of Spokane.

} ss

I, B. B. Adams, the Examiner, Specially appointed by order of the above entitled Court, in said cause, do hereby certify that the foregoing testimony of the respective witnesses named therein, to-wit:—F. M. Goodwin, J. W. Comerford, M. F. Webster, G. S. Wickman, J. R. Gilfellen, Charles M. White, Thomas B. Early, F. O. Hudnutt, L. K. Armstrong, H. V. Stevenson, and Jos. Kroll, was taken before me at the times and places mentioned therein, pursuant to agreement between, and notice to the attorneys for the respective parties to the action; that before testifying each of the several witnesses was by me separately and duly sworn to tell the truth, the whole truth and nothing but the truth, and that the foregoing testimony of each witness as named was, under my direction, taken down by E. R. Lindsey, a skillful stenographer, elected by me, and approved by both parties hereto, and that the testimony of said witnesses so taken by the stenographer was thereafter reduced to typewriting, and by the consent of the parties

the reading of the said testimony by the respective witnesses and the signatures of the said witnesses to their respective typewritten testimony was by the respective counsel waived.

The taking of said testimony was commenced on the 13th day of July, 1909, and on the 16th of July the same was continued until the 20th of July, and thereafter said examination took place every day until, and including, the 23rd day of July, 1909, when said examination by the consent of counsel was continued subject to the call of the examiner and consent of counsel; that thereafter on the 18th day of December, 1909, at the request of both parties, said examination was continued and completed; that there was introduced in evidence in behalf of the complainants exhibits 1 to 12 inclusive and in behalf of the defendants exhibits A to U inclusive, which constitutes all of the exhibits introduced in this case.

I further certify that said exhibits at all times when not being used in the examination of witnesses were in the custody of the clerk of this court, and that during the month of 1909, when said court was removed from the Hutton building in the city of Spokane to the new Federal building in said city, that in some manner unknown to the clerk defendant's exhibit A, a small round bottle containing two small pieces of gold and some black sand was broken on the side and some of the black sand lost; that defendant's exhibit F which was a half pint flat bottle, containing black sand and other particles was entirely broken but said pieces of said bottle and the sand contained therein were preserved

by the clerk, and that each of said bottles are enclosed in envelopes, marked respectively defendant's exhibit A and defendant's exhibit F.

That the said several exhibits which accompany this testimony were offered in evidence by the respective parties as noted therein.

WITNESS my hand this 6th day of January, 1910.

(Signed) B. B. ADAMS,
Examiner.

Endorsements: Written testimony taken before Special Examiner.

Filed January 6, 1910.

FRANK C. NASH, Clerk.

No. 1317.

In the Circuit Court of the United States, Eastern District of Washington, Eastern Division.

OSCAR CAIN, U. S. Atty and E. C. MACDONALD,
Asst. U. S. Atty., for Complainant.

BURCHAM & BLAIR, for Defendant.

UNITED STATES OF AMERICA,

Complainant,

vs.

MULTNOMAH MINING, MILLING AND DEVELOPMENT COMPANY, a corporation,

Defendant.

OPINION.

RUDKIN, District Judge. This is a suit in equity by the government to set aside the patents for the "Pea-

body and "Wickman" placer claims, situate in the Moses Mining district of Okanogan county, Washington, on the ground that the claims do not contain deposits of gold, and that the patents were obtained through false and fraudulent representations. The history of the two claims is as follows:

The Peabody placer, containing 157.173 acres was first located on the 16th day of June, 1901, by F. O. Hudnutt and seven others; the location notice was filed for record in the office of the County Auditor of Okanogan county on the 8th day of July, 1901; the claim was relocated on the 1st day of July, 1902, by the defendant company, as successor in interest to the original locators; the notice of re-location was filed for record in the same office on the 10th day of July, 1902; application for patent was filed in the local land office at Waterville on the 26th day of November, 1902; the Receiver's final receipt or certificate of entry was issued on March 11th, 1903, and patent was issued by the complainant on the 31st day of October, 1904.

The Wickman claim, containing 99.540 acres, was located by T. B. Early and four others on the 14th day of June, 1902; the location notice was filed for record in the office of the County Auditor of Okanogan county on the 3rd day of July, 1902; application for patent was filed in the land office at Waterville by the defendant, as successor in interest to the original locators, on the 26th day of October, 1902; the Receiver's final receipt or certificate of entry was issued March 11th, 1903, and patent was issued by the complainant on the 31st day of October, 1904.

The rules of law governing suits of this kind are well settled, and no useful purpose would be subserved by a review of the voluminous conflicting testimony taken before the Special Master. Four witnesses examined the claims at the instance of the complainant, and their testimony shows that the claims contain no deposits of gold, but are chiefly and highly valuable for other purposes. On the other hand, seven witnesses for the defendant have testified that they have found gold in considerable and paying quantities on all parts of these claims, and I might add, at many other points covering a wide range in that vicinity. It is a significant fact, however, that although more than eight years have elapsed between the date of the original location of the Peabody claim and the date of the last hearing before the Master, the net result of all mining operations on the two claims is a few fine particles of gold in two or three small phials containing water and black sand. The claims extend for more than a mile on either side of the Nespelem river from its confluence with the Columbia to a point above the falls; in crossing them the river falls upwards of one hundred and fifty feet. and the claims are valuable for both power and agricultural purposes.

After considering fully the location and character of the claims, the haste with which they were pressed to patent, their almost entire abandonment since that time, and all the facts and surrounding circumstances, I am fully convinced that the claims were initiated and perfected in fraud of the rights of the complainant, and equity and good conscience demand that patents so

obtained should be set aside and annulled. Let a decree be entered accordingly.

Endorsements:

Opinion.

Filed May 27, 1911.

FRANK C. NASH, Clerk.

No. 1317.

*In the Circuit Court of the United States, for the Eastern
District of Washington, Eastern Division.*

UNITED STATES OF AMERICA,

Complainant,

vs.

MULTNOMAH MINING, MILLING AND DEVELOP-
MENT COMPANY, a corporation,

Defendant.

DECREE.

This cause came on to be heard on the day of May, A. D. 1911, upon the report of B. B. Adams, Examiner heretofore appointed by this Court to take, transcribe and report the evidence and testimony in said case, and the Court having read and considered said evidence and the briefs of counsel for the respective parties hereto and being fully advised in the premises, it is

ORDERED, ADJUDGED AND DECREED

as follows, to-wit:

That those certain patents (being described in the bill of complaint herein), issued to the defendant Multnomah Mining, Milling and Development Company, a

corporation, by the complainant, United States of America, on or about, respectively:

July 10, 1902, covering and purporting to convey the following described premises, to-wit:

Beginning at Corner No. 1, identical with corner No. 1 of the location. A pine post $4\frac{1}{2}$ feet long, $4\frac{1}{2}$ inches square, set 2 feet in the ground, with mound of earth, scribed 1-680 U. S. L. M., No. 1, Moses Mining District; Bears south 26 degrees 4' east 115.95 feet. Thence N. 73 degrees 43' W. V. 22 degrees 15' E. 1736. To cor. No. 2. A cottonwood post $4\frac{1}{2}$ feet long, $4\frac{1}{2}$ inches square. Thence N. 59 degrees 46' W. 3572. To cor. No. 3. A cedar post $4\frac{1}{2}$ feet long, $4\frac{1}{2}$ in. sqr., Thence S. 48 degrees 30' W. 1782.5. To cor. No. 4, A cedar post $4\frac{1}{2}$ feet long, $4\frac{1}{2}$ in. sqr. Thence S. 85 degrees 03' E. 291.2. To cor. No. 5. A cedar post $4\frac{1}{2}$ feet long, $4\frac{1}{2}$ in. sqr. Thence S. 6 degrees 42' E. 150. Intersect north bank Nespelem River. 1000. Intersect south bank Nespelem river 1007.0. To cor. No. 6. A fir post $4\frac{1}{2}$ feet long, $4\frac{1}{2}$ in. sqr. Thence N. 88 degrees 34' E. 2678. To cor. No. 7. A cedar post $4\frac{1}{2}$ feet long, $4\frac{1}{2}$ in. sqr. The northwest corner of Eliza Ricard's fence, bears S. 75 degrees west 2.5 feet. Thence S. 75 degrees 43' E. 2687.8. To corner No. 8. A post $4\frac{1}{2}$ feet long, $4\frac{1}{2}$ in. sqr. Thence N. 37 degrees 35' E. 470. Intersect south bank of Nespelem river .510. Intersect north bank of Nespelem river 652.7. To cor. No. 1 and place of beginning, containing 157.173 acres. The above described premises being known and designated as the "Peabody Placer" mining claim. The name of the ad-

joining claims are the Wickman Placer on the north and west, and an unknown lode claim on the east.

June 14, 1902, covering and purporting to convey the following described premises, to-wit:

Beginning at corner No. 1, identical with cor. No. 2, Peabody Placer survey No. 680. Multnomah, Mining, Milling & Development Company, claimant. A cottonwood post $4\frac{1}{2}$ in. sqr., $2\frac{1}{2}$ ft. above ground, with mound of earth scribed 1-686 in addition to the original markings, U. S. L. M., No. 1, Moses Mining District, bears S. 71 degrees 30" E. 1816 feet. No bearing objects available. S. E, Loc. cor. identical with corner No. 1. Survey No. 680 and corner No. 2 survey No. 680. A post $4\frac{1}{2}$ in. sqr., $2\frac{1}{2}$ feet above ground, set in mound of earth N.E. loc. cor. No. 1 bears N. 26 E. 392 feet. Thence N. 50 5' W. Var. $22\frac{1}{4}$ E. 6481.08. To cor. No. 2. A granite stone 6"-9"-24' long set 12 inches in the ground, chiseled 2-686. Thence S. 44 48' W. 600. To cor. No. 3. A cedar post $4\frac{1}{2}$ in. sqr., $4\frac{1}{4}$ feet long, set 2 feet in the ground, scribed 3-686. Thence S. 30 58' E. 3028.71. To cor. No. 4 on line 3-4 survey No. 680 at N. 48 30' E. 782.5 feet from cor. No. 4. A cedar post $4\frac{1}{2}$ in. sqr. $4\frac{1}{2}$ feet long, set 2 feet in the ground. Thence N. 48 30' E. Along line 4-3 Survey number 680, Peabody Placer, 1000. To cor. No. 5. Identical with cor. No. 3. Survey number 680. A cedar post $4\frac{1}{2}$ in. sqr. $4\frac{1}{2}$ feet long set in the ground with mound of earth, scribed 5-686. Thence S. 59 46' E. Along line 3-2, Survey No. 680. 2050. Intersect ditch 4 feet wide. Course 50' W, 3572. To cor. number 1 and place of beginning contain-

ing 99.540 acres; said above described premises being known and designated as the "Wickman Placer" mining claim. The name of the adjoining claim is the Peabody Placer, Survey No. 680, on the South. This claim is located about three miles south of the Nespelem post-office, Okanogan County, Washington. Adjoining claim is the Peabody Placer on the South:

Are, and each of said above described patents is void and of no force or effect, and they are, and each of them is, canceled, set aside and held for naught, and the cloud on complainant's title to said lands, real estate and premises occasioned thereby is hereby cleared: and it is further

ORDERED, ADJUDGED AND DECREED that said defendant, nor any person or corporation acquiring any right, title or interest in and to said lands subsequent to the filing of the Lis Pendens herein, to-wit: March 14, 1908, has any right, title, interest or estate in said lands, real estate and premises, nor in any part or parcel thereof, and that the complainant, the United States of America, is the owner of, and entitled to the possession of, said lands, real estate and premises, and each and every part and parcel thereof, the same being situate in the Moses Mining District, Okanogan County, Washington, at the point where the Nespelem river joins the Columbia river;

That the complainant do have and recover from the defendant its costs and disbursements herein incurred.

Done in open Court this 17th day of July, A. D., 1911.

(Signed) FRANK H. RUDKIN, Judge.

To the foregoing decree the defendant excepts and an exception is allowed.

(Signed) FRANK H. RUDKIN, Judge.

Endorsements:

Final Decree.

Filed July 17, 1911.

FRANK C. NASH, Clerk.

*In the Circuit Court of the United States, for the Eastern
District of Washington, Eastern Division.*

UNITED STATES OF AMERICA,

Complainant,

vs.

MULTNOMAH MINING, MILLING AND DEVELOP-
MENT COMPANY, a corporation,

Defendant.

IN EQUITY NO.

ASSIGNMENT OF ERRORS.

And now on the 9th day of September, 1911, comes the said defendant by A. G. Elston, its solicitor, and says: that the decree in said cause is erroneous and against the just rights of said defendant for the following reasons:

I.

Because the evidence shows that title in and to the Peabody and Wickman placer claims was initiated and perfected in good faith in the manner and in accordance with the mining laws and the rules and regulations of the Department of the Interior governing the acquisition of title to public lands valuable for their deposits.

II.

Because the evidence showed, that the said placer

claims were appropriated from the public domain, subject to entry under the mining laws and the rules and regulations governing the appropriation of lands valuable for placer deposits, in good faith for the gold therein contained.

III.

Because the evidence showed that a bona fide discovery of gold in sufficient quantity to warrant a reasonable prudent man in expending his time and money in the development of the placer claims had in truth and in fact been made prior to the application for United States Patent thereto.

IV.

Because the evidence showed that since patent to the said placer claims were secured from the United States Government the plaintiff has been as diligent as its financial conditions would permit and the magnitude of the prospect allow under its financial circumstances, in the development of the said placer claims in the manner in which they will have to be developed, that is by hydraulic placer mining.

V.

Because the preponderance of the evidence clearly shows that the claims do contain deposits of gold and are highly valuable for their deposit of placer gold.

VI.

Because the court erred in finding that the net result of all mining operations of the two claims were a few particles of fine gold in two or three small vials containing water and black sand.

VII.

Because the court erred in finding that the claims are chiefly valuable for power and agricultural purposes.

VIII.

Because the court erred in concluding, from the location and character of the claims and the haste to which they were pressed to patent, that the claims were initiated and perfected in fraud of the rights of complainant.

IX.

Because the court erred in finding that the claims had been almost entirely abandoned since patent.

X.

Because the court erred in finding that equity and good conscience demanded that patents obtained should be set aside and annulled.

XI.

Because the court erred in that it did not hold that the complainant had failed by the preponderance of evidence to prove that the Multnomah Mining, Milling and Development Company had defrauded complainant of said lands or that there was any fraud perpetrated or attempted to be perpetrated upon the United States by defendant.

XII.

Because the court erred in not finding that there was an actual discovery of gold on the claims.

XIII.

Because the court erred in not finding that the ground covered by the patents sought to be cancelled was mineral in character and valuable for its placer deposits.

XIV.

Because the court erred in not finding that the title of the defendant in and to said placer claims were initiated and perfected in good faith in accordance with the mining laws and the rules and regulations of the Department of the Interior.

XV.

Because the court erred in not dismissing the bill of complainant.

WHEREFORE the defendant prays that said decree be reversed and that the said court be directed to dismiss the bill of complainant herein.

(Signed) A. G. ELSTON,
Solicitor for Defendant.

Endorsements:

Assignment of Errors.

Filed Sept. 9, 1911.

FRANK C. NASH, Clerk.

*In the Circuit Court of the United States, for the Eastern
District of Washington, Eastern Division.*

UNITED STATES OF AMERICA,

Complainant,

vs.

MULTNOMAH MINING, MILLING AND DEVELOPMENT COMPANY, a corporation,

Defendant.

IN EQUITY NO. 1317.

PETITION FOR APPEAL TO THE UNITED
STATES CIRCUIT COURT OF
APPEALS.

The above named defendant conceiving itself aggrieved, by the decree made and entered on the 17th day of July, 1911, in the above entitled cause, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and he prays that this appeal will be allowed and that a transcript of the record, proceedings, and papers upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

(Signed) A. G. ELSTON,
Attorney for Plaintiff.

Dated this 9th day of September, 1911.

The foregoing claim of appeal is allowed.

Dated this 9th day of September, 1911.

(Signed) FRANK H. RUDKIN, Judge.

Endorsements:

Petition for Appeal and Order allowing Appeal.

Filed February 9, 1911.

FRANK C. NASH, Clerk.

*In the Circuit Court of the United States, for the Eastern
District of Washington, Eastern Division.*

UNITED STATES OF AMERICA,

Complainant,

vs.

MULTNOMAH MINING, MILLING AND DEVELOP-
MENT COMPANY,

Defendant.

ORDER.

On reading and filing defendant's petition for an appeal, it is hereby ORDERED that an appeal be and is hereby allowed to the United States Circuit Court of Appeals for the Ninth Circuit from the order and decree heretofore rendered, on the 17th day of July, 1911, in favor of the complainant and against defendants.

It is further ORDERED that a certified transcript of the record, testimony, exhibits, affidavits and all proceedings herein upon which said order and decree was made be forthwith transcribed to the said Circuit Court of Appeals.

It is further ORDERED that the bond on appeal be fixed at a sum of five hundred dollars.

Dated at Spokane, Washington, this 11th day of September, 1911.

(Signed) FRANK H. RUDKIN, Judge.

Endorsements:

Order allowing Appeal.

Filed October 2nd, 1911.

FRANK C. NASH, Clerk.

*In the Circuit Court of the United States, for the Eastern
District of Washington, Eastern Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MULTNOMAH MINING, MILLING AND DEVELOP-
MENT COMPANY,

Defendant.

BOND.

KNOW ALL MEN BY THESE PRESENTS, that we, the Multnomah Mining, Milling and Development Company, a corporation, organized and existing under and by virtue of the laws of the State of Washington, as principal, and the Fidelity & Deposit Company, of Maryland, a surety bonding company, authorized to do business in the State of Washington, and under the federal laws, are held and firmly bound unto the United States of America in the full and just sum of Five Hundred (\$500.00) Dollars, to be paid to the said United States of America, its United States District Attorney or United States Treasurer, to which payment well and truly to be made we bind ourselves, our successors, administrators and assigns, jointly and severally, by these presents.

WHEREAS, lately at a circuit court of the United States for the Eastern District of Washington, Eastern Division, in a suit depending in said court, between the United States of America, plaintiff, and the Multnomah Mining, Milling and Development Company, a corporation, defendant, a decree was rendered against the Multnomah Mining, Milling and Development Company, and the said Multnomah Mining, Milling and Development Company having obtained an appeal, and filed a copy thereof in the office of the Clerk of said court, to reverse the decree in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the City of San Francisco, State of Cali-

fornia, in said Circuit on the.....day of....., 1912, having been issued.

Now, therefore, the condition of the above obligation is such, that if the Multnomah Mining, Milling and Development Company shall prosecute its appeal to effect and shall answer all damages and costs imposed if it fails to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed with our seals and dated this 2nd day of October, the year of our Lord one thousand nine hundred and eleven.

(Signed) MULTNOMAH MINING, MILLING
& DEVELOPMENT CO.

By DR. F. O. HUDNUTT,
General Manager.

Sealed and delivered in the presence of:

(Signed) M. B. BUSHNELL,

(Signed) M. A. CAMPBELL.

Approved by:

(Signed) FRANK H. RUDKIN,

U. S. District Judge.

Dated this 2nd day of October, 1911.

Endorsements:

Appeal Bond.

Filed Oct. 2, 1911.

FRANK C. NASH, Clerk.

*In the Circuit Court of the United States, for the Eastern
District of Washington, Eastern Division.*

UNITED STATES OF AMERICA,

Complainant,

vs.

MULTNOMAH MINING, MILLING AND DEVELOP-
MENT COMPANY,

Defendant.

CITATION (Lodged Copy).

The President of the United States, to the United States of America, the complainant above named:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the City of San Francisco, in the State of California, within Thirty (30) days from the date of this writ, pursuant to an appeal filed in the Clerk's office of the Circuit Court of the United States for the Eastern District of Washington, Eastern Division, wherein the Multnomah Mining, Milling and Development Company, a corporation, are appellants, and the United States of America, is respondent, to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States of America, this 3rd day of October, A. D. 1911, and of the Independence of the United States the one hundred and thirty-fifth.

(Seal.)

(Signed) FRANK H. RUDKIN,
United States District Judge.

Attest: FRANK C. NASH,

Clerk of said Court.

Endorsements:

Citation (Lodged Copy).

Filed Oct. 2nd, 1911.

FRANK C. NASH, Clerk.

*In the Circuit Court of the United States, for the Eastern
District of Washington, Eastern Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MULTNOMAH MINING, MILLING AND DEVELOP-
MENT COMPANY,

Defendant.

ORDER.

Upon motion of the appellant it is hereby ordered that the exhibits filed in the trial of the above entitled cause in the United States Circuit Court, be by the Clerk of the said Court transmitted with the transcript on appeal to the United States Circuit Court of Appeals, at San Francisco, California.

(Signed) FRANK H. RUDKIN, Judge.

Endorsements:

Order to send Original Exhibits.

Filed October 19, 1911.

FRANK C. NASH, Clerk.

In the District Court of the United States, Eastern District of Washington, Northern Division.

UNITED STATES OF AMERICA,

Complainant,

vs.

MULTNOMAH MINING, MILLING AND DEVELOPMENT COMPANY, a corporation,

Defendant.

NO. 1317.

PRAECIPE FOR TRANSCRIPT OF RECORD
ON APPEAL.

To the Clerk of the above-entitled Court:

You will please make a transcript of the record for use on appeal in the above-entitled cause as follows:

1. Bill of Complaint.
2. Answer to Bill of Complaint.
3. Replication.
4. Opinion of the Court on the Merits.
5. Final Decree.
6. Petition for Appeal.
7. Order Allowing Appeal.
8. Assignment of Errors.
9. Bond on Appeal.
10. Original Citation issued in said Cause.
11. Deposition of Arthur J. Collier.
12. Testimony on file in said Cause.
13. Order to send to C. C. A. Original Exhibits.
14. Stipulation dated Oct. 27, 1911, extending time for printing record 60 days.
15. Stipulation dated Jan. 2, 1912, extending time for printing record for 90 days.

16. Stipulation dated April 1, 1912, extending time for printing record to August 10, 1912.

17. Stipulation extending time for printing record to October 30, 1912, dated September 9, 1912.

18. Stipulation extending time for printing record until December 31, 1912, dated October 30, 1912.

19. Stipulation extending time for printing record to January 30, 1913, dated December 30, 1912.

20. Stipulation extending time for printing record until March 15, 1913, dated January 23, 1913.

(Signed) A. G. ELSTON,
Solicitor for Defendant.

Endorsements:

Praeipie for Transcript of the Record.

Filed October 2, 1911.

FRANK C. NASH, Clerk.

No. 1317.

In the District Court of the United States, Eastern District of Washington, Northern Division.

UNITED STATES OF AMERICA,

Complainant,

vs.

MULTNOMAH MINING, MILLING AND DEVELOPMENT COMPANY, a Corporation,

Defendant.

CLERK'S CERTIFICATE TO TRANSCRIPT OF
RECORD.

UNITED STATES OF AMERICA, }
Eastern District of Washington, } ss

I, W. H. HARE, Clerk of the District Court of the

United States for the Eastern District of Washington, do hereby certify the foregoing printed pages, numbered from one to 881 inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings as called for by the appellant in his praecipe for a transcript of the record herein as the same appears on page 880 of this printed record, and as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on appeal from the order, judgment and decree of the Circuit Court of the United States for the Eastern District of Washington, Eastern Division, now the District Court of the United States for the Eastern District of Washington, Northern Division, to the Circuit Court of Appeals for the Ninth Judicial Circuit, San Francisco, California.

I further certify that I hereto attach and herewith transmit the original Citation issued in this cause.

I further certify that the cost of preparing, certifying and printing the foregoing transcript is the sum of \$906.55, and that the same has been paid to me by A. G. Elston, Esquire, attorney for the defendant and appellant.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court at Spokane, in said District, this 28th day of February, 1913.

(Signed) W. H. HARE,

(SEAL)

Clerk.

2
No.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

MULTNOMAH MINING, MILLING AND DEVELOP-
MENT COMPANY, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellant

*Upon Appeal from the United States District Court
for the Eastern District of Washington,
North Division.*

A. G. ELSTON, Peyton Building, Spokane, Washington,
Solicitor for Appellant,

OSCAR CAIN, United States District Attorney, Federal
Building, Spokane, Washington,

and

EDMUND J. FARLEY, Assistant United States District
Attorney, Federal Building, Spokane, Washington,
Solicitors for Appellee.

No.....

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

MULTNOMAH MINING, MILLING AND DEVELOPMENT COMPANY, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellant

*Upon Appeal from the United States District Court
for the Eastern District of Washington,
North Division.*

STATEMENT OF CASE.

This is an appeal by the Multnomah Mining, Milling & Development Company from a final decree of the United States District Court for the Eastern District of Washington, Northern Division, in a suit brought by the United States, to cancel two certain patents issued by the United States to the Multnomah Mining, Milling

& Development Company, for the Peabody and Wickman placer mining claims, on the grounds of misrepresentation and fraud on the part of the company in securing title thereto. The lands involved in this suit are located at the confluence of the Nespelem and Columbia Rivers, on the south half of the Colville Indian Reservation, in Okanogan County, Washington, and contain an acreage of approximately two hundred and fifty-seven and a fraction acres.

The Peabody placer claim, contains an area of one hundred and fifty-seven and a fraction acres and lies on both sides of the Nespelem River from a point near its confluence with the Columbia River (Exhibit No. 4) up the river for a distance of about one mile.

The east end of this claim is rocky and the river at the extreme east end has a considerable fall at a point just above where improvement No. 3, a ditch, leaves the river.

The Wickman placer, joins the Peabody on the north, and west and extends toward the eastern end of the Peabody, as far as corner No. 2 of the Peabody. North of the Wickman placer is a rocky bluff or hill sloping upward from the Peabody placer at about 45 degrees or more.

The surface of the two claims lie from ten to seventy-five feet above the low water level of the Columbia.

The Nespelem River, before it enters the Peabody claim, flows for miles through a crystalline and highly mineralized country, bearing gold among other minerals, and scattered through the country through which it flows are numerous quartz claims which have been established and worked for years, and shipping ore, which mines carry gold among other minerals.

The Columbia River, which flows past these claims on the southwest and has for years been known as a gold bearing stream and has long been mined by Chinamen and others for its placer gold.

These claims were located under the placer laws of the United States in the year of 1901 and 1902, that is, the Peabody was located in the year of 1901 and the Wickman in the year of 1902.

The Government charges that said locations and each of them were false and fraudulent, and that the patents issued therefor by the United States were secured by reason of the false and fraudulent representations of the company, in this, "That the said alleged mineral claims did not, at the time of location, or at the time the application for patent therefor, was made, contain *deposits of, or any gold.*" This is denied by the company and upon this charge by the United States and the denial of the company issue was formed. The testimony was taken before a master and from the testi-

mony so taken the court found for the United States as follows:

DECREE.

This cause came on to be heard on the day of May, A. D. 1911, upon the report of B. B. Adams, Examiner heretofore appointed by this Court to take, transcribe and report the evidence and testimony in said case, and the Court having read and considered said evidence and the briefs of counsel for the respective parties hereto and being fully advised in the premises, it is

ORDERED, ADJUDGED AND DECREED, as follows, to-wit:

That those certain patents (being described in the bill of complaint herein), issued to the defendant Multnomah Mining, Milling and Development Company, a corporation, by the complainant, United States of America, on or about, respectively:

July 10, 1902 (*October 31, 1904*), covering and purporting to convey the following described premises, to-wit:

The italics are ours.

Beginning at corner No. 1, identical with corner No. 1 of the location. A pine post $4\frac{1}{2}$ feet long, $4\frac{1}{2}$ inches square, set 2 feet in the ground, with mound of earth, scribed 1-680 U. S. L. M. No. 1, Moses Mining District.

Bears south 26 degrees 4' east 115.95 feet. Thence N. 73 degrees 43' W. V. 22 degrees 15' E. 17'6. To Cor. No. 2. A cottonwood post $4\frac{1}{2}$ feet long, $4\frac{1}{2}$ inches square. Thence N. 59 degrees 46' W. 3572. To Cor. No. 3. A cedar post $4\frac{1}{2}$ feet long, $4\frac{1}{2}$ inches square. Thence S. 48 degrees 30' W. 1782.5. To Cor. No. 4, a cedar post $4\frac{1}{2}$ feet long, $4\frac{1}{2}$ inches square. Thence S. 85 degrees 03' E. 291.2. To Cor. No. 5. A cedar post $4\frac{1}{2}$ feet long, $4\frac{1}{2}$ inches square. Thence S. 6 degrees 42' E. 150. Intersect north bank Nespelem River 1000. Intersect south bank Nespelem River 1007.0. To Co. No. 6. A fir post $4\frac{1}{2}$ feet long, $4\frac{1}{2}$ inches square. Thence N. 88 degrees 34' E. 2678. To Cor. No. 7. A cedar post $4\frac{1}{2}$ feet long, $4\frac{1}{2}$ inches square. The northwest corner of Eliza Ricard's fence, bears S. 75 degrees west 2.5 feet. Thence S. 75 degrees 43' E. 2687.8. To Cor. No. 8. A post $4\frac{1}{2}$ feet long, $4\frac{1}{2}$ inches square. Thence N. 37 degrees 35' E. 470. Intersect south bank of Nespelem River .510. Intersect north bank of Nespelem River 652.7. To Cor No. 1 and place of beginning, containing 157.173 acres. The above described premises being known and designated as the "Peabody Placer" mining claim. The name of the adjoining claims are the Wickman placer on the north and west, and an unknown lode claim on the east.

June 14, 1902, covering and purporting to convey the following described premises, to-wit:

Beginning at corner No. 1, identical with Cor. No. 2, Peabody Placer Survey No. 680. Multnomah, Mining, Milling & Development Company, claimant. A cottonwood post $4\frac{1}{2}$ in. sqr., $2\frac{1}{2}$ ft. above ground, with mound of earth scribed 1-686 in addition to the original markings, U. S. L. M. No. 1, Moses Mining District, bears S. 71 degrees 30" E. 1816 feet. No bearing objects available. S. E. Loc. Cor. identical with corner No. 1, Survey No. 680 and corner No. 2, Survey No. 680. A post $4\frac{1}{2}$ in. sqr., $2\frac{1}{2}$ feet above ground, set in mound of earth N. E. Loc. Cor. No. 1 bears N. 26 E. 382 feet. Thence N. 50 5' W. Var. $22\frac{1}{4}$ E. 6481.08. To Cor. No. 2. A granite stone 6"-9"-24' long set 12 inches in ground, chiseled 2-686. Thence S. 44 48' W. 600. To Cor. No. 3. A cedar post $4\frac{1}{2}$ in. sq., $4\frac{1}{4}$ feet long, set 2 feet in the ground, scribed 3-686. Thence S. 30 58' E. 3028.71. To Cor. No. 4 on line 3-44 Survey No. 680 at N. 48 30' E. 782.5 feet from Cor. No. 4. A cedar post $4\frac{1}{2}$ in. sq., $4\frac{1}{2}$ feet long, set 2 feet in the ground. Thence N. 48 30' E. along line 4-3 Survey Number 680 Peabody Placer, 1000. To Cor. No. 5. Identical with Cor. No. 3. Survey Number 680. A cedar post $4\frac{1}{2}$ in. sq., $4\frac{1}{2}$ feet long set in the ground with mound of earth, scribed 5-686. Thence S. 59 46' E. Along line 3-2, Survey No. 680, 2050. Intersect ditch 4 feet wide. Course 50' W. 3572. To Cor. No. 1 and place of beginning containing 99.540 acres; said above described premises being known and designated as the "Wickman Placer" mining claim.

The name of the adjoining claim is the Peabody Placer, Survey No. 680, on the south. This claim is located about three miles south of the Nespelem postoffice, Okanogan County, Washington. Adjoining claim is the Peabody Placer on the south;

Are, and each of said above described patents is void and of no force or effect, and they are, and each of them is, canceled, set aside and held for naught, and the cloud on complainant's title to said lands, real estate and premises occasioned thereby is hereby cleared; and it is further

ORDERED, ADJUDGED AND DECREED that said defendant, nor any person or corporation acquiring any right, title or interest in and to said lands subsequent to the filing of the *lis pendens* herein, to-wit, March 14, 1908, has any right, title, interest or estate in said lands, real estate and premises, nor in any part or parcel thereof, and that the complainant, the United States of America, is the owner of, and entitled to the possession of, said lands, real estate and premises, and each and every part and parcel thereof, the same being situate in the Moses Mining District, Okanogan County, Washington, at the point where the Nespelem River joins the Columbia River:

That the complainant do have and recover from the defendant its costs and disbursements herein incurred.

Done in open Court this 17th day of July, A. D. 1911.

OPINION.

Rudkin, *District Judge*. This is a suit in equity by the Government to set aside the patents for the "Peabody" and "Wickman" placer claims, situate in the Moses Mining District of Okanogan County, Washington, on the ground that the claims do not contain deposits of gold, and that the patents were obtained through false and fraudulent representations. The history of the two claims is as follows:

The Peabody placer, containing 157.173 acres was first located on the 16th day of June, 1901, by F. O. Hudnutt and seven others; the location notice was filed for record in the office of the County Auditor of Okanogan County on the 8th day of July, 1901; the claim was relocated on the first day of July, 1902, by the defendant company, as successor in interest to the original locators; the notice of relocation was filed for record in the same office on the 10th day of July, 1902; application for patent was filed in the local land office at Waterville on the 26th day of November, 1902; the Receiver's final receipt or certificate of entry was issued on March 11th, 1903, and patent was issued by the complainant on the 31st day of October, 1904.

The Wickman claim, containing 99.540 acres, was located by T. B. Early and four others on the 14th day of June, 1902; the location notice was filed for record in

the office of the County Auditor of Okanogan County on the 3rd day of July, 1902; application for patent was filed in the land office at Waterville by the defendant as successor in interest to the original locators, on the 26th day of October, 1902; the Receiver's final receipt or certificate of entry was issued March 11th, 1903, and patent was issued by the complainant on the 31st day of October, 1904.

The rules of law governing suits of this kind are well settled and no useful purpose would be subserved by a review of the voluminous conflicting testimony taken before the Special Master. Four witnesses examined the claims at the instance of the complainant, and their testimony shows that the claims contain no deposits of gold, but are chiefly and highly valuable for other purposes. On the other hand seven witnesses for the defendant have testified that they have found gold in considerable and paying quantities on all parts of these claims, and I might add, at many other points covering a wide range in that vicinity. It is a significant fact, however, that although more than eight years have elapsed between the date of the original location of the Peabody claim and the date of the last hearing before the Master, the net result of all mining operations on the two claims is a few fine particles of gold in two or three small phials containing water and black sand. The claims extend for more than a mile on either side of the Nespelem river from its confluence with the Columbia

to a point above the falls; in crossing them the river falls upwards of one hundred and fifty feet, and the claims are valuable for both power and agricultural purposes.

After considering fully the location and character of the claims the haste with which they were passed to patent, their almost entire abandonment since that time, and all the facts and surrounding circumstances, I am fully convinced that the claims were initiated and perfected in fraud of the rights of the complainant, and equity and good conscience demand that patents so obtained should be set aside and annulled. Let a decree be entered accordingly.

ASSIGNMENT OF ERRORS.

And now on the 9th day of September, 1911, comes the said defendant by A. G. Elston, its solicitor, and says: That the decree in said cause is erroneous and against the just rights of said defendant for the following reasons:

I.

Because the evidence shows that title in and to the Peabody and Wickman placer claims was initiated and perfected in good faith in the manner and in accordance with the mining laws and the rules and regulations of

the Department of the Interior governing the acquisition of title to public lands valuable for their deposits.

II.

Because the evidence showed, that the said placer claims were appropriated from the public domain, subject to entry under the mining laws and the rules and regulations governing the appropriation of lands valuable for placer deposits, in good faith for the gold therein contained.

III.

Because the evidence showed that a *bona fide* discovery of gold in sufficient quantity to warrant a reasonable prudent man in expending his time and money in the development of the placer claims had in truth and in fact been made prior to the application for United States patent thereto.

IV.

Because the evidence showed that since patent to the said placer claims were secured from the United States Government the plaintiff has been as diligent as its financial conditions would permit and the magnitude of the prospect allow under its financial circumstances, in the development of the said placer claims in the manner in which they will have to be developed, that is, by hydraulic placer mining.

V.

Because the preponderance of the evidence clearly shows that the claims do contain deposits of gold and are highly valuable for their deposit of placer gold.

VI.

Because the Court erred in finding that the net result of all mining operations of the two claims were a few particles of fine gold in two or three small vials containing water and black sand.

VII.

Because the Court erred in finding that the claims are chiefly valuable for power and agricultural purposes.

VIII.

Because the Court erred in concluding, from the location and character of the claims and the haste to which they were pressed to patent, that the claims were initiated and perfected in fraud of the rights of complainant.

IX.

Because the Court erred in finding that the claims had been almost entirely abandoned since patent.

X.

Because the Court erred in finding that equity and good conscience demanded that patents obtained should be set aside and annulled.

XI.

Because the Court erred in that it did not hold that the complainant had failed by the preponderance of evidence to prove that the Multnomah Mining, Milling and Development Company had defrauded complainant of said lands or that there was any fraud perpetrated or attempted to be perpetrated upon the United States by defendant.

XII.

Because the Court erred in not finding that there was an actual discovery of gold on the claims.

XIII.

Because the Court erred in not finding that the ground covered by the patents sought to be cancelled was mineral in character and valuable for its placer deposits.

XIV.

Because the Court erred in not finding that the title of the defendant in and to said placer claims were initi-

ated and perfected in good faith in accordance with the mining laws and the rules and regulations of the Department of the Interior.

XV.

Because the Court erred in not dismissing the bill of complainant.

WHEREFORE, the defendant prays that said decree be reversed and that the said Court be directed to dismiss the bill of complainant herein.

ARGUMENT.

THE FIRST, SECOND, THIRD, FOURTH AND FIFTH ASSIGNMENTS OF ERROR MAY WELL BE GROUPED AND CONSIDERED TOGETHER, UNDER THE HEAD:

WAS THERE AN ACTUAL BONA FIDE DISCOVERY OF PLACER GOLD UPON THESE LANDS AND WAS THERE SUCH INDICATIONS OF MINERAL AS WOULD WARRANT A REASONABLY PRUDENT MAN IN EXPENDING HIS TIME AND MONEY WITH THE EXPECTATION OF FINDING GOLD?

We submit that the testimony of defendant's witnesses conclusively show such to be the fact. In this connection particular attention is invited to the testimony of witnesses Gilfillen, Kroll, White and Armstrong on

behalf of the appellant, which testimony is hereafter analyzed and discussed in connection with the testimony of the witness of the Government.

ASSIGNMENT OF ERROR NO. 6.

The Court evidently reached an erroneous conclusion considering the testimony of witness Kroll, who gave into court defendant's Exhibit "U" for the purpose of showing the character and not the quantity of gold taken from its placer claims. (See Record, page 834 *et seq.*) While it may be true that the claims have not yielded a profit in gold, such could not be expected, as according to the testimony of Armstrong, a civil and mining engineer of long experience, an expenditure of large sums of money is first essential in the installation of hydraulicking machinery before profitable mining operation can be carried on, and as appears from the testimony of witness Early and others, on behalf of the defendant, hereinafter considered, funds for the installation of such machinery were not available.

Mining history has shown that the development of a paying mine is a slow process. A little has to be done from time to time as the company or individual secures the necessary funds, adding to what has been previously done until such time as work can be carried on uninterrupted and with profit. If it were necessary that a paying mine should be developed before patent therefor

would be issued by the Government, and if the absence of a paying mine was sufficient for the cancellation of patents, the mineral wealth of the United States would forever remain concealed.

All that the law requires for a valid discovery, is such an indication of mineral as would warrant a reasonably prudent man in going ahead in an endeavor to find mineral in paying quantities and an individual or company is entitled under the law to have its mining locations patented to it, when it has shown a valid discovery and the requisite amount of development.

ASSIGNMENT OF ERROR NO. 7.

WERE THE CLAIMS VALUABLE BECAUSE OF WATER POWER POSSIBILITIES OR FOR AGRICULTURAL PURPOSES?

The testimony of Howland Stevenson, a witness examined in behalf of the Government, shows that the water power possibilities has fatal limitations for on page 786, he says "the river gets dry or nearly dry a certain portion of the year" (Rec. 786). His testimony is hereinafter considered at length and when taken in connection with the testimony of witness Armstrong on behalf of the defendant company conclusively shows that so far as the water power value of the claims are concerned it is practically of little value, excepting in connection with the mining claims of the company, so also

the finding that the claims were valuable for agricultural purposes. It is conclusively shown by the testimony as hereinafter set forth that these claims, the Peabody especially, were cut up in gullies, were rolling and had a very light soil, not susceptible of cultivation. Even admitting that there was situate on the claims a valuable water power and that the claims had agricultural values, such admissions do not change the situation in any way if the land is valuable for its placer gold.

In the case of *United States v. Iron, Silver Mining Company* (128 U. S. 685), the Supreme Court, speaking through Justice Field, said:

“It may be, as contended, that Stevens was moved in his advice to Sawyer as much by the existence of valuable growth of timber on the land as by the existence of gold in the ground, and that the timber could be advantageously used by the Iron, Silver Mining Company. If such were the fact, it would not affect the applicant's claim to a patent. Probably in a majority of cases where a placer claim is located, other matters than the existence of valuable deposits of mineral enter into the estimate of its worth. Its accessibility to places where supplies and medical attendance can be obtained for the men engaged in working upon it, and timber secured to support the drifting or tunnelling which may be necessary; the facility with which water can be brought to wash the mineral from the earth, sand or gravel, with which it may be mingled; and the uses to which the land may be subjected when the claim is exhausted, may be proper subjects of consideration. A prudent miner acting wisely in taking up a claim, whether for a placer mine or for a lode

or vein, would not overlook such circumstances and they may in fact control his action in making the location. If the land contains gold or other valuable deposits in loose earth, sand or gravel, which can be secured with profit, that fact will satisfy the demand of the government as to the character of the land as placer ground, *whatever the incidental advantages it may offer to the applicant for a patent.*”

This case presents a great many facts similar to the facts in issue in the case at bar and the attention of the Court is particularly invited thereto.

ASSIGNMENTS OF ERROR NOS. VIII, IX, AND X MAY ALSO WELL BE GROUPED AND CONSIDERED TOGETHER.

It should not be held against a company as indicating the value of or non-value of lands acquired under mineral laws, that patent is secured with more than ordinary urgency, for under the law, after patent is secured, further expenditure of money in assessment work is not necessary and the company or individual can then best begin to plan such permanent improvements as will tend to the development of the claim. The testimony in the case at bar shows, that the company after securing patent went to great expense in the excavation of a flume bed which had to be blasted from solid rock for the purpose of conveying water upon the claim in controversy, which water was essential to a profitable working of the claims.

ASSIGNMENT OF ERRORS XI, XII, XIII, XIV AND XV, INVOLVE THE SAME QUESTIONS AND MAY WELL BE CONSIDERED TOGETHER, UNDER THE SAME HEADING AS ASSIGNMENT OF ERRORS I, II, III, IV, AND V.

The Court in the case of the United States v. Iron, Silver Mining Company, *supra*:

“We take the general doctrine to be, that when in a court of equity, it is proposed to set aside, to annul or to correct a written instrument for fraud or mistake, in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal and convincing, and that it can not be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contract of private individuals how much more should it be observed *where the attempt is to annul the grants, the patents and other solemn evidences of title emanating from the government of the United States under its official seal.* In this class of cases the respect due to a patent, the presumptions that all the preceding steps required by the law *had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments, demand that the effort to set them aside, to annul them or to correct mistakes in them should only be successful when allegations on which this is attempted are clearly stated and fully sustained by proof.*” (The italics are ours.)

FRAUD.

The United States, if it prevails in this action, must establish by clear and convincing proof, that a fraud was knowingly perpetrated by the company in the location of the lands in the application for patent therefor.

It must establish by a fair preponderance of evidence, not only that there was not a valid discovery of mineral, under the mining laws of the United States, but that fraud in the location and application for patent was practiced upon the United States by the company.

The lands in the Colville Indian Reservation were thrown open to exploration and purchase in July, 1898, under the mining laws of the United States, which laws permit the acquisition by location and patent from the Government of its public lands which are mineral in character.

WHAT ARE MINERAL LANDS?

In determining what lands are mineral in character, and what quantity of mineral they must contain to constitute them mineral lands, we can not be governed by the law because it fixes no limit, nor does it say, that it must be more valuable for mineral than for other purposes, but that they be valuable for mineral purposes and we believe that a true test of the right to secure patent from the United States for a tract of land under its mineral laws, is that it contains such indication of

mineral as would encourage the miner to claim and locate it in good faith as mining ground, and work and develop it in the reasonable expectation of finding mineral in paying quantities, and we believe the true rule to be not that the land must be valuable for exploitation, but that it be valuable for exploration.

The rule as laid down by the courts seem to be that there must be such indication of mineral as would warrant a reasonably prudent man in expending his time and money in the development of the claim. It is not necessary under the law, to entitle a man to secure patent for a tract of land under the mining laws, that he shall have developed a mine; a prospect can be patented under the mining laws; provided, the requisite expenditures have been made thereon and the patent issued by the Government is not an assurance that the land patented contains a mine, but is merely a protection to the locators assuring them that the fruits of his preceding years' labor shall not be disturbed by subsequent locators and that he shall have the uninterrupted right to continue his explorations to prove the land sufficiently valuable for exploitation.

WHAT IS A DISCOVERY?

Any deposit of mineral matter or indication of a vein or lode found in a mineralized zone or belt, within defined boundaries upon which a person is willing to spend

his time and money in following in expectation of finding ore, is the subject of a valid location.

Hayes v. Lavagnino, 53 Pac. 1030;

1 *Lindley, Mines*, 336;

Mining Company v. Cheesman, 116 U. S. 529;

Harrington v. Chambers, 1 Pac. 362;

Railway Company v. Migeon, 68 Fed. 811;

Burke v. McDonald, 29 Pac. 98;

Book v. Mining Co., 58 Fed. 106;

Shrieve v. Mining Co., 28 Pac. 315;

Larkin v. Upton, 114 U. S. 19.

In the case of *Burke v. McDonald*, 29 Pac. 98, the following instruction was requested in the Court below:

“A lode, within the meaning of the statute, is whatever the miner could follow, and find ore. Under the requirements of the law, a valid location of a mining claim may be made whenever the prospector has discovered such indications of mineral that he is willing to spend his time and money in following with the expectation of finding ore; and a valid location of a mining claim may be made of a ledge deep in the ground, and appearing at the surface, not in shape of ore, but in vein matter only.” The Court modified the instruction by changing the word “willing” to “justified.” The Appellate Court said, the word “justified” radically changes the whole meaning of the instruction. The question whether the miner is willing to spend his time and money is an entirely different one from the question whether he is justified in doing it. The former is a question to be answered by the miner himself, with or without advice as he may choose. The latter word would present a question for ex-

perts and for the jury to determine. The instruction was correct without modification. *Harrington v. Chambers* (Utah), 1 Pac. Rep. 375, approved in *Eilers v. Bostman*, 4 Sup. Ct. Rep. 432.”

In the light of the law applicable and the rule governing cases of this kind let us examine the testimony of the several witnesses on behalf of the respective parties, to see if a discovery was made.

TESTIMONY OF MESSRS. COLLIER AND GOODWIN.

The testimony of Mr. Collier shows that in the year of 1906, he and Mr. Goodwin were engaged in examining the gold-bearing banks and parts of the Columbia river on behalf of the Government; that they were present on the Peabody and Wickman placers for a period of part of two days (Rec. 59), that most of the time was devoted to the Peabody, about “three-fourths of the time” was devoted to the Peabody, “just about half a day, perhaps a little less,” to the Wickman (Rec. 59). During this time they were occupied in measuring the falls by means of an aneroid which necessitated their traveling about two miles taking pictures of the falls; they also made a measurement of the flow of the river, which consumed at least “one hour.” They further occupied a considerable time evidently in looking for evidences of the construction of a ditch on that portion of the land which was included within the land-slide testified to; and they

further made a detailed examination of the ditch upon the surface of the Wickman. The examination of the ditch was so minute that the witnesses testified that they observed that it was not puddled and did not show the effects of the presence of water therein. They further observed the mining claims to the north and commenced getting ready to leave the property before five o'clock on the day after their arrival upon the placers. They consumed some time in running the lines of the placers and had not come to the placers until about ten o'clock on the previous morning. Further, this merely shows that whatever panning was done from the Wickman was done on the Columbia river, and complainant's "Exhibit 4" herein reveals the distance necessarily traversed by Messrs. Collier and Goodwin, and the time consumed in making the few trips testified to by them.

It is apparent, therefore, that these two witnesses did not have time to make a proper examination of the placers and did not make any sufficient examination to determine their gold-bearing character. The nature of the examination made by these witnesses is shown in the deposition of Mr. Collier (Rec. 66-67), where he testifies as follows:

Q-86. How many prospect holes did you find on the Peabody placer?

A. We found about six.

Q-87. What diameter?

A. They were about 6x6 approximately.

Q-88. You panned them all?

A. We did not pan all of them, no.

Q-89. Why didn't you?

A. We did not have time to.

Q-90. Were you hurried?

A. We were somewhat hurried.

Q-91. Why?

A. We had some other claims to examine afterwards.

Q-92. There were gullies running through that placer, were there not?

A. Yes.

Q-93. Did you pan all of these?

A. Not all of them, no.

Q-94. You did not for the reason you have given, that you were hurried?

A. Yes.

It is shown that the first examination for gold was made in the improvement 1, discovery shaft at the northwest corner of the Peabody, and that panning was done at this point. Both Mr. Collier and Mr. Goodwin panned at this place, there being thus at least two panning devoted to this pit. They then (Rec. 130) went to improvement 2 shaft and again panned two pans of dirt from that pit. No further pannings were made upon the surface of the Peabody other than in "a little gulley" (Rec. 119) and at certain points upon the Nespelem river (Rec. 120).

This then constitutes the extent of their examination of the Peabody, an examination, we submit, wholly insufficient to prove or disprove the mineral character of the land.

From the point of entrance of the Nespelem river into

the Peabody placer to its point of flowing therefrom, according to complainant's "Exhibit 4" is a distance of more than one mile. Mr. Goodwin says that they panned "at four different places on the Nespelem river," and "two different places, I think, on the Nespelem river, not in any former improvement, and in two shafts and in one place that might have been a shaft or an improvement or cut." The witness further says that he "could not give the exact location of each particular panning," and "we did no panning on the Columbia, that is, with dirt taken from the shore line of the Columbia river" (Rec. 70). Apparently the pans taken from the Nespelem river, "the three or four pans," referred to by both witnesses, were taken, "a little nearer the Columbia river than the other end of it." This, apparently, was all the panning done along the banks of the Nespelem river and presents, it is submitted, a very cursory examination. True, both witnesses testified that they examined dirt from the bed of the Nespelem river, but there is nothing to indicate the character of this examination or the number of pannings done from the bed of the rivers. It is certain the number of pits examined on the Peabody outside the examinations in the bed of the river and the three or four in the banks of the river did not exceed four in number, for upon cross-examination (Rec. 138) Mr. Goodwin testified as follows:

Q. How many pits did you examine on the Peabody did you say?

A. Three pits, and I recall one which might have been a pit; I don't know whether it was or not.

Judging from the sweeping examination testified to by Mr. Collier one would infer that the examinations made by these two gentlemen were most careful and comprehensive.

When the testimony of these two witnesses is analyzed, however, it appears that the number of panings made for the purpose of discovering gold was not so comprehensive. For instance, Mr. Collier testified in his direct examination (Rec. 45) that "at several places on the edge of this bench there were gullies washed out by the water * * *. We took samples from these gullies and panned them and found no gold. These gullies should have contained some gold if there was any to be found in the soil of the bench, and our negative results on them show that there is very little, if any, gold to be found in the benches." Now any reasonable man would admit that an examination of a single spot in a single gulley of many gullies crossing this property, would not constitute a fair examination of the two placers with respect to their gold-bearing possibilities. Further, the average man, if he was reasonable would not conclude from such an examination that the entire property carried no gold. If of a fair mind, he might conclude that he, like other human beings, had made a

mistake in his pannings. Further, the average man, if he were seeking for the truth, would have made many other pannings and from the different gullies which he could find upon the properties and from the gravel which Goodwin says underlies the claims (Rec. 141). Most assuredly, had his examination been limited to one, such a person would have had an accurate recollection of that fact and would not have testified as Mr. Collier did in the general way shown by the quotations above. But it appears by his own testimony given thereafter (Rec. 45), that he was speaking of "gullies" rather than a single gulley that had been examined by him. But is shown by the testimony of Mr. Goodwin (Rec. 138) that but one gulley had been examined by these witnesses.

Mr. Collier on cross-examination (Rec. 70), being asked whether he had panned any of the gullies, said, "In the gullies we did not pan at all."

This inconsistency between Mr. Collier's testimony in chief and his cross-examination is rather suggestive. The Court will notice (Rec. 45) that the witness not only testified to a general examination of samples from the gullies upon these placers, but also confirmed his testimony by placing in the record an argument that, inasmuch as these gullies did not contain gold when they panned them, their negative results "Showed that there is very little, if any, gold to be found on the benches"

(Rec. 46), the witness expresses his opinion most freely throughout his testimony, that neither the Peabody or the Wickman were valuable for placer mining purposes, it may be fair to suggest that these conclusions are as worthless as the one just specially referred to.

It appears, that in panning upon the Peabody at the various prospect holes, the witness, Mr. Collier (Rec. 48), found that "the dirt was left on the dumps of the prospect holes," after the original prospectors had made the holes. He says they examined the dirt that was left upon the dumps, took samples of it and washed it. Now, as but few pans of dirt were taken from the several prospect holes upon the Peabody it is fair to assume that they included the dirt from the dumps surrounding these prospect holes in the pans panned by them, from these various prospect holes. There is nothing in the testimony to deny this and the probability that they did so is very marked. There is no doubt that the dirt upon the dumps surrounding the prospect holes, as shown by the testimony hereafter referred to, had been there for many years, subjected to pounding by snow and rain. If, as suggested, such mixing was done, it is clear that the examination was not only inadequate in point of area covered, but was most careless and insufficient in point of manner of its doing, as the rain would naturally wash the gold remaining at the time of excavation back to virgin soil.

Referring particularly to the investigation of the Wickman placer, the full examination as revealed by the testimony of Mr. Goodwin, is as follows:

They examined improvement 1 discovery shaft, which is located at the northeast end of the Wickman placer (Rec. 115), the witnesses each taking a pan of dirt in this place and panned it in the Nespelem river, and in one pan they found two small colors (Rec. 130). Mr. Collier in his testimony, states that these two colors were found upon the Peabody placer (Rec. 97-98). They then examined the land in the vicinity of improvement 2 shaft, upon the same placer, which is located at the west end and of that placer, being, as shown by "Exhibit 4" in complaint herein, a distance of at least one mile from improvement shaft No. 1, just referred to. It is not clear from the testimony of Mr. Goodwin (Rec. 131) whether they took all their dirt at that place from "one particular pit" or whether they took it from "three differetn pits," for the testimony of Mr. Goodwin conflicts on this point. It will be observed in this connection that he first speaks (Rec. 130) of a hole of certain dimensions, then of three different pits, and finally on Rec. 131 he says, "I can not tell which *one* of the three it was." Apparently, however, in view of the questions just preceding this answer, they examined three pits and took their sample from one. However, the statement made before is true that these three pits or one pit, were at the extreme end, for Mr. Goodwin

states (Rec. 132) that they were "the farthest to the east that we found."

Nothing further appears in the testimony of Mr. Goodwin indicating any further examination of the Wickman in this particular, and the witness indicates, as shown before, that he did not know that they had panned any dirt from the improvement 2 shaft as shown upon complainant's "Exhibit 4."

Mr. Collier, after stating (Rec. 54) that their examination of the Wickman "covered the whole area," states (Rec. 54) that they "panned *several* of the prospect holes." Nothing further appears in the direct testimony of Mr. Collier relative to the number of pannings done upon the Wickman, yet, upon the basis of this examination, Mr. Collier gave his sweeping opinion that in his opinion gold could not be taken out of the Wickman claim in paying quantities. To further emphasize the statement that the examination of the Wickman was most inadequate, Mr. Collier testified (Rec. 70) that there were about six prospect holes on the Wickman placer, and that they panned about "two or three" of these prospect holes but did not pan in the gullies at all, nor did they pan along the shore of the Columbia river (Rec. 70).

Perhaps the insufficiency of this examination may have resulted from the mental condition of the witnesses. Being sent there for the purpose of examining these

properties and having complaints against them in mind, their minds being somewhat persuaded by the fact of their employment by the Government, analyzed the evidence presented to them in an argumentative way, with an inclination to place upon the property itself the burden of their prejudice. This biased attitude of manner is shown very clearly throughout the testimony of Mr. Collier (Rec. 43). After beginning the description of the soil within the limits of the Peabody placer, he readily draws the inference that the entire bench land rests on "a thin layer of gravel" and with partisan eagerness (Rec. 44) interpolates the statement "there is no gold that will justify mining operations." Further (Rec. 45) the witness makes the peculiar observation to his attorney, that the latter had omitted to ask him "a question that ought to have come in, I guess." He then (Rec. 45) makes a statement tending to show a very broad and complete panning examination of the Peabody placer, which we have shown never occurred. The witness further stated (Rec. 48) with reference to the dirt at the surface of one of the pits, that it had never been washed. This shows a willingness to have their judgment depended upon as to dirt which necessarily must have been pounded by many rains, and further on this head it indicates a willingness to represent to the Court that it was to be expected that the defendants had washed this dump dirt, when, as a matter of expressed admission by witness Collier, the only place

where the dirt could have been washed was in the waters of the Columbia and Nespelem rivers.

He further stated (Rec. 56) that the land was valuable for agricultural purposes but upon cross-examination he admitted that he had never farmed, and had never raised fruit in Washington, and that there was no traffic communication by railroad with these placers.

Again on page 53 is another peculiar suggestion to his counsel, and after stating that their examination had covered "the whole area of the Wickman," states gratuitously with reference to the south line of the Wickman placer, that it was "carefully surveyed" in order "to leave out of consideration a certain line of sand dunes." This in itself shows the mental attitude of this witness. He assumed at that time that because the south line of the Wickman placer did not go to the Columbia river there existed a suspicious circumstance operating against the defendant, but as is shown thereafter in the course of the hearing, the reason for the exclusion of this strip along the Columbia from patent depended altogether upon the requirement of law which prevented patenting more than a certain number of acres to each location represented, and that originally the Wickman placer did include up to the river and that the exclusion took place by reason of the law aforesaid at the time of the survey preliminary to the application for patent was made. The witness thus showed his readiness to draw

an inference against defendant. Further, his readiness to state conclusions and not facts, is apparent, for he says (Rec. 53) "that the soil of the Wickman claim is *presumably* of the same character as the bench land of the Peabody claim." The use of the word "presumably" indicates a tendency of the witness to testify to facts as known by him when, as we have seen, his examination of the Wickman was wholly inadequate to permit him to so testify. His statement (Rec. 54) that "*the ditch is constructed where the construction is easy,*" indicates, by its verbal phrasing, a mental attitude that had already convicted the witness of an absence of good faith for the ditch where constructed completely is, in part, in rock blasted out to make a flume bed. He again makes the same ready answer with reference to the unwisdom of a prudent man expending his time and labor upon these claims, and with reference to the value of the Wickman placer for agricultural purposes, and further that the land would be valuable for townsite purposes (Rec. 57). This last statement is similar to many more made by this witness. He was questioned upon this point in cross-examination (Rec. 80) and said that he believed "that there are some falls below (this property), some rapids below that are impassable," and that there was no railroad or electric line running to this point. When questioned as to the basis of his knowledge as to the value of this property as agricultural land,

he admitted (Rec. 81) that it was very hard to tell but that he supposed this land "would go toward the better mark" of \$400.00 per acre, but admitted that it had the drawback of no railroad communication (Rec. 82). There is another significant fact which somewhat affects the testimony of Messrs. Collier and Goodwin. This appears in the deposition of Mr. Collier (Rec. 97-98). Before this Mr. Collier had testified that upon examining a certain pit, in one pan they had found two colors. This had come out on cross-examination, but nothing more. The witness had not testified to this on his direct examination. On re-direct examination, when asked by his attorney what area of the claim did these cover (Rec. 972, he stated (Rec. 98) that there was a small pay streak at that point on a part of the bench a great deal higher than the main bench of the claim, and that these two colors appeared in the little pay streak thereon, which, he says, "extended over about one or two acres of ground at that elevation. And he adds further (Rec. 98) that this ground is situated in the panhandle of the Peabody claim.

The fact that this witness refrained from disclosing the presence of this pay streak as he did throughout his direct and cross-examination is most significant. The answer was finally drawn out by the accidental question asked by his own counsel. Further, as bearing on the main issue of the case, as to the presence of gold upon

this property, it must necessarily be of potent influence. As shown by the witness, this pay streak of one or two acres in extent, was in the panhandle of the Peabody claim at a very high elevation. The conclusion of the witnesses, Messrs. Collier and Goodwin, that the gold could only be found upon the bed rock or clay, was here contradicted by a fact known by these two witnesses. It shows, also, that by some cause the fine gold in the form of a very fine pay streak, had been disseminated over and placed upon an area of at least two acres and at a very high elevation. Presumably then if the testimony of Mr. Collier upon this is to be believed, the lower benches were "progressively richer," than the upper, it must be true that the lower parts or part of the Peabody and Wickman placers would also bear gold.

The foregoing review of the testimony of Messrs. Goodwin and Collier shows the very cursory examination they made of the soil of these two placers.

TESTIMONY OF GEORGE W. COMERFORD.

We will treat the testimony of this witness briefly. It is so fully answered by the weight of the testimony adduced by defendant that its negative character can be left to the answering and rebutting effect of that testimony. The witness had been in Cripple Creek in 1895 (Rec. 158), but he "had practically no placer * * * experience there" (Rec. 158), and apparently his placer

experience in Nevada for "about 3 or 4 months" was of a cursory nature (Rec. 159), and after that his experience was in Alaska (Rec. 159), where the gold found in placer ground is of such a large character that one can perhaps understand the point of view of this witness when dealing with the minute flour gold of the Columbia and the small gold particles of the Nespelem. One can also conclude that, perhaps, the personal glory assumed by this witness in having "\$300,000 taken out under his supervision, personal direction and inspection" (Rec. 54) may have affected his idea of the value of these placers admittedly containing gold of much smaller size than he had been accustomed to in Alaska. He, however (Rec. 160), corroborates the testimony of the defendants given by Armstrong and others later, as to the heavy expense of the conduct of a placer by showing (Rec. 160) that his "expense in the operation * * * for six months' was approximately \$40,000. This, although necessarily of a somewhat general application, seems to credit the defendant's testimony that it, with a treasury never showing more than a few thousand dollars, was justified in refraining from immediate and extensive construction work. (Most assuredly no inference can be raised against the defendant because work has not been pushed pending this litigation.) His real examination of the property was confined to one day and until three o'clock of the next, when, as he said, he "got disgusted and went home" (Rec. 175). His

mental attitude is well shown by that remark, and also by his remark (Rec. 176) that he "would like to find some showing when I start * * * but the condition of the soil and the placer was such that any person that had experience as an observing man would never look for gold there" (Rec. 176). Further, he manifests a caution in guarding his testimony that is peculiarly suggestive. Note on page 176 he said, "I would not be surprised but a man might find colors at a favorable—," and then he stopped. Also his observation of the sluice boxes and his failure to pan in their vicinity (Rec. 174). Involved in his action is his mental appreciation that he had truthfully and properly used the word "favorable," and his stopping at this point and subsequent explanation involved a practical admission that his own examination had not been made at "favorable" places. This witness was not certain that he had panned in any discovery shaft made by defendant, all that his testimony shows here is that he "panned from a hole that lay in that direction * * * from a hole that lay in that section * * * (Rec. 177). This, in view of the fact that his own testimony shows the presence of many holes on the property, and in view of the fact that many other persons had prospected there, renders very dubious the evidently biased admissions of the witness. When asked why he had not panned along the Nespelem (Rec. 176), said that he "was looking for gold where they had made development, and where they had

claimed development, taking their word for discovering it where they hit it." His examination is, therefore, far from fair; that it is wholly insufficient to indicate the facts as to the gold-bearing character of this property is shown by the fact that in his examination he did not get into the gravel. Apparently influenced somewhat by his knowledge that an "agricultural contention" was being made, this witness was unconsciously affected by the necessity of the presence of a loam soil. Further, he directed his examination to the end that he could testify that he did not find gold where the defendant said it found gold—and he would in this process charge the defendant with having claimed discovery of gold in holes, possibly, by his own testimony made by others and never explored by the defendant. This witness, it must be remembered, was the "last resort" witness used by the Government. The Government had used witnesses Collier and Goodwin and it had been admitted that their examination had been "hurried," and, therefore, this witness was sent to the property. Most assuredly he knew the status of the testimony, and that he was sent there *not* to find gold. Accordingly he examined holes which were in the general locality of the discovery holes, but *failed to examine the property generally to find whether it did bear gold*. Many years had passed over this property since these holes were dug—some had been there ten years before (see testimony of Kroll, Gilfillen and White),

and assuming, in order to give his examination its greatest force, that he did examine the real discovery hole, that he did not find any gold is not strange. The natural effect of the weather would be to wash the gold down. We are rather concerned in the other question—"Is there gold in the placers?" That was the matter which he should have investigated. He saw sluice boxes along the Nespelem, but he "*didn't pan there*" (Rec. 174). He didn't pan along the stream of the Nespelem (Rec. 174), although, as he must have known, any presence of gold there would indicate the probability of gold throughout this placer ground which has in this triangular delta or eddy, been formed by these two rivers. He says he "*didn't examine the Nespelem in any way whatever*" (Rec. 176). Nor did he pan in any of the ravines (Rec. 178), although it appears in the testimony of the witnesses generally that these ravines showed gravel and panned gold. Later witnesses show that there is on the south side of the Nespelem a bank of gravel, extensive and high, and, according to the testimony referred to hereafter specifically, shows gold in good quantities—but this witness avoided it. He says (Rec. 178), that he "*didn't pan on the south side of the Nespelem.*" Apparently he avoided the big gulch, which is at the west end of the Wickman, but confined himself to places that did not answer to the description of "*favorable*" (Rec. 176). The testimony shows that the gravel crops out along the Columbia on

this property, and that gold is there, but he did not pan there. Now the Government is not concerned whether one man may not find gold where another claims he has found it—it is interested in and the issues of this case, are an investigation and solution of the question whether this property does contain gold. To place any weight upon this manner of investigation is to rely upon the merely conjectural. He may have done his duty as a partisan witness, and may have carried out his instructions, but he most palpably failed in his greater duty to examine this property in its “favorable” as well as unfavorable places, and to make an honest endeavor to find what such an examination would show as to the actual mineral value of the land.

The witnesses in attempting to make a suggestion which has nothing to sustain it except the assertion of his own opinion, impliedly concedes (Rec. 179) that this property could be hydraulicked and sluiced from the Nespelem waters.

The defendant, appellant herein, has tried to show to this Court a full and complete examination of all parts of this property. We have not confined our examination to any one part of this property. We have not confined our examination to the “grass roots,” as phrased by one of the witnesses. Our explorations have covered the surface, the ravines, the gulches, the adjoining property to the south and east, the excluded strip,

the island in the Columbia, along the Nespelem, high and low, the shore of the Columbia, and we have shown by a careful examination the presence of underlying gold-bearing gravel throughout this whole property.

Contrasted with the futile, partisan and narrow limitation of this witness's examination, there is a marked difference, which must affect the credit to be given the different testimony.

Further comment on this witness' testimony will be made in connection with the testimony of later witnesses.

TESTIMONY OF HOWLAND VAN NESS STEVENSON.

This witness, who admitted on his direct examination that he was "generally what you might call an expert miner" (Rec. 772), involved himself in some contradictions during his testimony. Asked why he had not examined "along the Columbia" (Rec. 789) on the excluded strip, he says, "I was not on this land" (Rec. 789), while later on when asked the same question (Rec. 794), he said, "I didn't know there was any excluded strip there" (Rec. 794); then when pressed further as to why he didn't pan there, he gives this answer, "I didn't see any gravel there to pan" (Rec. 794), although he says he looked (Rec. 794) for gravel "there to pan" (Rec. 794).

We do not mean to say that this witness was falsifying deliberately. Experience will tell a lawyer that witnesses may draw conclusions, although they have not observed, and testify to their conclusions as facts, and may not realize meanwhile that they are not testifying to *the facts or to the truth*; further, many a witness will argue his testimony with the opposing attorney and not realize that he is not *narrating* the facts; further, there is the merely careless witness who deems his conclusions of the moment based upon a sufficient recollection, and he testifies as Mr. Stevenson did here—asserting, forgetting and contradicting. But this is true of such a witness—he is as undeserving of credit as is the lying witness.

He said (Rec. 772) that he had acted for a great many people, but could not recollect the names of any companies (Rec. 817); he said (Rec. 776) that he “took a great many” pans from the ditch, but admitted later (Rec. 777) that he had taken but 9 pans in the whole length of the ditch (Rec. 777)—a distance of about a mile (as shown upon the plat in evidence). We note, too, that according to his testimony he did not take these pans from the gravel; of course the ditch is on the surface, so that it must be conceded that dirt taken from the ditch is not from these “favorable” places referred to, and avoided by Mr. Comerford. His testimony as to the pits or shafts tend to corroborate the witnesses for

the appellant that they were caved in, and to support our contentions that Comerford's examination of these pits was not an adequate test. Stevenson says (Rec. 777) "most of them (the pits) had been caved," and he evidently did not dig down to the gravel in the pits, for he says (Rec. 777) "there was no gravel there in any of the pits * * *" and he panned from some gravel on the dump of two of the pits, not stating how long this gravel had been exposed to the weather (Rec. 777). He evidently panned nothing but soil, for the "pits," he says, "were all in a very loose soil" (Rec. 778). Perhaps what he means is that they were caved in at the top, and he did not exert himself to dig through to the gravel. Assuredly, this examination of leached soil and gravel is not a proper test. His testimony as to his pannings along the Nespelem is fully met by the testimony of Kroll. If his panning there was as superficial as seems his work on the placers, it is not strange that he did not find gold. Something of the vagueness, generalization and the cursory manner followed by this witness in his examination of this property is further revealed in his testimony touching the fact of the Nespelem river flowing through a mineralized country (Rec. 808-811). He examined it for lodes, and he says (Rec. 811) "in the afternoon I went down along the bank of the river to look around," took a "cursory" look around (Rec. 811)—"Sunday afternoon I wandered down the banks of this river and took a look

around to see my surroundings” (Rec. 811) and in this general way concluded that there was no mineralized lodes along the river. Further, he generalizes freely as to the number of days he spent on this trip. He says at one place “3 to 4” (Rec. 811), and then he says, “I staid from 3 to 5 days,” and “I think it was 5 days” (Rec. 779). One of these days was consumed looking for lodes (*supra*). His testimony that “above the bluff there are ranches * * * agricultural lands” (Rec. 780) is fully answered, so far as any inference that this water could be used for irrigating such lands, is concerned, by his own testimony that it is up hill from the placers to Nespelem (Rec. 796). He admits in connection with his agricultural land testimony, that he doesn’t know how many acres there are (Rec. 796), evidently drawing his conclusions from a purchase of vegetables from a half-breed “that drove a stage and had a ranch down there” (Rec. 796), didn’t know whether it was cultivated (Rec. 796). As to the use of irrigation his lack of knowledge is shown by his answer to the question (Rec. 796, “Do they use irrigation there?”—“wherever they can get it” (Rec. 797)—didn’t know whether wheat or corn was raised, but was certain he grew vegetables, “Because I bought them from him” (Rec. 797), but was altogether ignorant of the acreage (Rec. 797).

The testimony of the witness is most unsatisfactory

as to the necessary yield of gold per cubic yard to render the property valuable. On page 802 he says that 10 cents would be necessary, while on page 804 he conceded he could run the ground "into the Columbia at 5 cents per cubic yard very easily" (Rec. 804), and further (Rec. 805), after his knowledge and confidence had been shaken by extracts from that text, he said doubtfully that, "I think that it would not pay at 2 cents per cubic yard." Further, the contradiction and unreliability of his testimony are shown by contrasting his concessions on cross-examination with his astounding statement (Rec. 785) that a paying quantity of gold would be "three cents a pan" (Rec. 785). This was emphasized by a succeeding question, "Three cents a pan?" Answer: "Yes, sir." Viewing this in connection with the other testimony of other witnesses that there were from 120 to 150 pans in a cubic yard, and that this witness said (Rec. 811) that there were from 130 to 160 to 166 pans in a cubic yard, it shows a looseness and shifting which shows his testimony to be unreliable.

His knowledge of the practical features of placer mining may well be doubted in view of his testimony (Rec. 806), which shows that he had once attempted to work a placer in Oregon—that he "fell down on it;" and apparently his chief work was in building a ditch and constructing a pipe, when the "water goes out" (Rec. 807) and they stopped. This was his only prac-

tical placer experience (Rec. 807) and covered a period of 50 days (Rec. 806).

The witness does show us something, for we succeeded in extorting from him that "if there was gold on these two placers" (he) "would say this was an ideal placer proposition." He says further, "I have never seen a property exactly like this, where they had water so convenient as this" (Rec. 786). He further corroborates the defendant's testimony by showing that at another time he had panned on a bar in the Columbia opposite this property and found gold (Rec. 789), and he testified that defendant's Exhibit "N" contained "very fine placer gold" (Rec. 788) * * * "Quite a lot" (Rec. 788). His testimony that the "Nespelem river up here gets dry or nearly so at certain portions of the year" (Rec. 786) would indicate that, for commercial power purposes, the water power has fatal limitations.

This witness, sent to the placer to strengthen the testimony of Comerford *et al.*, does not add anything to its weight, and shows the same weakness of observation, examination and qualification. He is fully met by the testimony of subsequent witnesses.

This, then, is the testimony upon which the Government relies for the cancellation of the patents involved in this case and it is contended that a more fragile case could not well be brought into court, as none of these

men made any sufficient examination of the property to determine its mineral value.

TESTIMONY OF G. S. WICKMAN.

Examining the testimony of G. S. Wickman, witness for the defense, we find he was on the placer in 1903, and "went over the placers thoroughly" (Rec. 185) and panned the ground and "found quite a string of it (gold) in the pan, perhaps an inch and a half long;" they panned on both the Peabody and Wickman and were there "from 9 to 10 hours" and also "panned at various places along the Nespelem river, from half a mile up the river, all the way along down to a little inlet * * * on the Columbia river" on the north side (Rec. 186) and also "on the Peabody placer away from the bank * * * at various places where they had sunk holes," and also in a gully that runs all through the Peabody placer (Rec. 186) and they "found gold in several pans" (Rec. 186); witness testified that he did "not" remember seeing a "blank pan" along the banks of the Nespelem river (Rec. 187); he further testified (Rec. 188) that the quantity found was "from 2 to 15 colors in a pan," getting the higher average on the river (Rec. 188); the witness was candid and truthful in saying (Rec. 189) that he "could not say" that he had panned the discovery hole, although they had "panned in various places around where the discovery

holes were'' (Rec. 189). Witnesses also, at this time (Rec. 191) (1903) panned upon the Wickman at "the bank" near Corner No. 4 and then over near Corner No. 2 (Rec. 191) and "found colors in it" (Rec. 192), the colors being observable to the naked eye; it further appeared that at this time two strangers were also panning upon the placers (Rec. 192).

There is one rather impressive feature of Mr. Wickman's testimony on this head—that he took some of the dirt to St. Paul and had it assayed (Rec. 194), and that as a result of the impression made upon this witness he invested more in the stock of the company (Rec. 195), and advised his friends and his brothers and members of his immediate family to invest (Rec. 196).

He testifies (Rec. 197) that he made a second visit in June, 1906, and found gold (Rec. 198), the pans containing from 2 to 8 or 10 colors; also that he panned there in September, 1908 (Rec. 199-200) and found gold (Rec. 200), the other members of the party also finding gold, finding "in one pan ten colors that could be seen with the naked eye—one of them was quite a good sized flake" (Rec. 200). He panned at this last time on the Nespelem, and on the north side of the river and found colors (Rec. 201). He describes the piece of gold found there—"two round pieces connected with a little neck across" (Rec. 200). He also went upon the property in July, 1909, in company with Dr. Hudnutt and Mr.

White, both of whom also testify to the same facts (Rec. 201), and they panned on both sides of the Nespelem.

At this time he found colors (Rec. 201) and saw Mr. White discover a small nugget in his pan. This was on the Peabody placer, but at this time he also panned on the Wickman (Rec. 200) and taking some “* * * gravel and some dirt and loam,” he saw it panned, and colors found (Rec. 203) visible to the naked eye; he also found colors of gold in his own panning (Rec. 203).

His cross-examination on this head begins on page 219, Rec. He shows that he found colors on his first trip in 1903 in “every pan that I took out of the gravel” (Rec. 220), and that they found gravel “All along the banks;” that there were “little flakes of gold in the pan” (Rec. 220)—“a thin piece of gold.”

In answering with reference to the pan in which there was a string of colors “an inch and a half long,” he he said (Rec. 222) that that pan was not “phenomenal,” “it was not extra.” He told of panning in the Wickman (Rec. 223) and that they “found colors” “along the bank” and “some over in a hole” (Rec. 224). He testifies forcibly (Rec. 224) that on the Peabody there were always colors in the pan—“always when we took the dirt from the gravel. I don’t think I ever saw a blank in any pan where we took the gravel” (Rec. 224) and, as was to be expected, the witness tes-

tified that "away from the river" they didn't get "as much gold as * * * along the Nespelem river" (Rec. 225).

The witness shows what is common to the testimony of all witnesses, that the Nespelem river runs through a highly mineralized belt (Rec. 225) before entering the placer, and (Rec. 226) that the presence of gold in the placers and in the hills and along the upper Columbia river (Rec. 227) was in his mind as circumstances indicating gold in these placers. The witness showed his candor (Rec. 229) in answering fearlessly that there was a good water power upon the placers in the falls of the Nespelem river (Rec. 229). As shown by all the witnesses, the presence of water at a height above placer ground is absolutely necessary to profitable placer operations, and defendants have never thought of, or contended in any way that these placers could be worked independently of the natural advantages of the water fall located upon them. That is equally important with the presence of gold in the ground, and "its use" in connection with its purely hydraulicking possibilities, for purposes collateral thereto, the generation of power necessary for the work upon the placers—would most assuredly be a contemplation within the mind of any rational person, and, within the law as laid down by the Supreme Court (*United States vs. Iron Sil-*

ver Mining Co., *Supra*), the fact that locators such as the defendants contemplate other uses of this power, would not be of material weight. The insinuations, frequently made by complainant's attorneys, that the defendants were greatly influenced by the irrigation possibilities of these placers, are certainly gratuitous, in view of the testimony on this head, referred to heretofore in the examination of the testimony of Messrs. Goodwin and Collier. This is supported by the testimony of the witness (Rec. 230) that when selling stock in the defendant company, he did not refer to the possibility of irrigating the property. No doubt, as shown by the mere fact that water will seek its level, the water from a height could be used to irrigate land lying at a lower level. It was not necessary for this witness to concede this fact (Rec. 231), so it is equally apparent that water in the process of seeking its level will make "water power" (Rec. 231) and "drive machinery and generate electricity" (Rec. 231).

Further, the witness (Rec. 320) developed the legal situation more accurately than it seems to exist in the Government's case, when upon being asked, 'How do you know it would be a paying proposition?' he answered, "I don't know as it would." Nor does any one know. All prospects are, at most, as said by Justice Brewer years ago, "mere guesses at the undiscovered bowels of the hills," and courts which do not take notice of the hazard of mining chances and determine the duties of

miners under the mining laws in view thereof, do not exercise their judicial duties properly.

This witness inferred from all these various examinations that, "When we panned it and found gold there in various places (my opinion), was that there was plenty of gold there and it could be gotten out profitably" (Rec. 236). In this connection complainant's attorney seems to insinuate that, because this witness had not himself worked out to a nicety and in detail the methods, machinery and processes to be used in hydraulicking this property, he could not have had in mind, or that he could not have had reason to believe (Rec. 236) that this property would hydraulic profitably. Counsel seemed to assume that, when witnesses stated on direct examination that he believed that "the property * * * contained gold that could be worked profitably," the witness was testifying as an expert, and seems oblivious of the true force of the witness's statement—*viz.*, that his non-expert belief showed the good faith of this officer of the defendant company.

The nature of the justification for this belief, whether dependent in part upon the statements of others who had a comparatively adequate (though perhaps not an expert knowledge) of mining hydraulics, or upon a personal examination of the property is a matter of indifference. Further, this is put beyond any doubt by the admission and testimony of the complainant's witnesses,

that in its hydraulicking feature this property was "an ideal placer proposition" (Stevenson, Rec. 802).

The foregoing testimony of Mr. Wickman, even uncorroborated, aided as it is by the narration of circumstantial incidents attending the various findings of gold, is sufficient to show the Court the remarkable character of the examination by the witnesses for the complainant, appellee herein.

TESTIMONY OF WITNESS GILFELLEN.

This witness lived in the Colville Reservation since 1899, and his continuous occupation has been mining. He has pursued the occupation of mining for 20 years in Alaska, Old Mexico and the United States, and in the States of Washington, Oregon, California, Colorado and Idaho within the United States (Rec. 259); that he had done gold placer mining in Alaska, Oregon, Old Mexico and in the State of Washington on the Nespelem, and Columbia rivers and at Cedar mountain (Rec. 260). That he had done hydraulic placer mining in the John Day basin in Oregon, and that during part of that time he had charge of the work in the John Day basin (Rec. 261); that during all of the second season he did panning and he showed by his examination (Rec. 262) that his experience there gave him a full knowledge of hydraulic placer mining. He then shows (Rec. 262²) that he did placer mining by means of the hydraulicking

method in Old Mexico, and not only by the general character of his testimony on these pages, but also by his direct statement (Rec. 262) he shows that he was "familiar with all the processes involved in hydraulicking gold from placers;" that he did placer mining and prospected at Circle City and Birch creek in Alaska for 7 years, and that during that time he had property of his own and also worked the property of others; that while in Alaska he had done panning and sluice box placer mining (Rec. 263); and further testifies, as one would no doubt infer, that as a result of such experience he was able to "save the particles of gold," when he panned (Rec. 263); that after other mining experiences (Rec. 264) he went to the Nespelem in 1898, for the purpose of "prospecting for quartz and placers;" that "while following his occupation of miner at that time" (Rec. 264) he went upon the Wickman and Peabody ground; that at that time he was prospecting for placer gold and he prospected upon these properties; "we panned gold upon them" (Rec. 266). This was about 2 years before any of the defendants saw this ground.

The witness then shows (Rec. 266) that at that time they were there "somewhere from a week to ten days, camping on the ground and worked all over it, or nearly all over it" (Rec. 266). The witness then in detail testifies (Rec. 268) as to the panning done at that time and testifies that "we commenced down to the mouth of the

river and panned on both sides * * * about half a mile up on the river"—the Nespelem river,—showing further, that they had panned "around about where the cabin stands and down on the flat and on the high gravelly bench on the south side" (Rec. 268), and the witness shows (Rec. 269) that they found gold in the panning along the river, both "fine gold and coarse gold," and that this gold was "visible to the naked eye." The witness then shows that on the south side of the river along the Nespelem was "very high bank of gravel for about half a mile up" (Rec. 269) and that the height of that bank "was fully 60 feet of gravel, that could be washed" (Rec. 269). The witness further testifies (Rec. 271) that on the bank "we panned a good many different places * * * near the stream" and "high up on the bank," and the witness shows that they found gold "in nearly every pan we took out of the gravel bank" and that the "character of the gold in the gravel bank is generally coarse," that the witness found coarse gold and fine gold (Rec. 271).

Witness further shows that they "panned on the north side of the Nespelem river," "from the Columbia river," "about half a mile up" (Rec. 272) and "*we found gold right along when we got into the gravel.*" The witness also shows the presence of gravel by stating in this connection that "we got into the gravel very near every place we tried,—we dug down until we got into the gravel" (Rec. 272). That they panned in the

gulches on the Peabody and found "flour and coarse gold both" (Rec. 272), his attention then being directed to the Wickman placer; he testified that they panned upon the Wickman (Rec. 272) * * * "Along about the center of the claim and from the center to the Columbia river, the whole length of the Wickman property upon the river * * * to the lower end of the Wickman property," where, as shown by this witness (Rec. 273), "a deep gulch comes down;" that this panning included "any number of places along the bank where the bank had cut—along the gravel" (Rec. 273) and the witness shows the results of the panning along the Columbia river were that "we found gold every place that we panned down the Columbia river, where we went into the gravel,—*any place we found gravel we found gold*" (Rec. 274); that they found gold in the gulch referred to hereinbefore (Rec. 274).

The witness shows a rather significant fact in his testimony relative to this gulch in testifying (Rec. 274) that "the gulch in general is gravel * * *" and that "we didn't get to the bottom of the gravel. There was seven or eight feet of gravel generally that we were working in,—that we panned on." This in itself must be significant to the Court as it was to this miner and the defendants as to the quantity of the gold-bearing gravel present in these placers. The witness shows (Rec. 275) that the depth of the gulch was "35 or 40

feet” and that the thickness of the gravel “where it enters into the river (was) 25 or 30 feet of gravel” (Rec. 275), that they “panned the full length of the Wickman and found gold right along * * * both fine and coarse” (Rec. 275).

The witness further testifies that, at that time they panned “outside the limits of these placers” * * * “both above and on the Columbia river below them, panning an island out in the middle of the river * * * just opposite (the Wickman)” and “700 or 800 feet distant” and “we found coarse gold” (Rec. 277). The witness shows that Mr. Peterson accompanied him upon this trip, and that in addition to the panning just referred to they panned at a point about 200 feet south of the “south line of the Peabody placer” (Rec. 277) and found gold. The testimony of this witness shows that south of the Peabody placer, is a bar connected together with the Peabody placer, that it is called “Condon’s Flat;” that it “contains gravel and a little lake” and that there was “gold all through the gravel so far as we went;” that we dug at the shore—high water mark of the lake and the gravel, and panned there and found gold” (Rec. 278).

He shows also that they panned along the Columbia from the mouth of the San Poil river above these placers and panned along the Columbia until about 8 miles below the Nespelem (Rec. 278) and found both fine and

coarse gold. The witness illustrates his testimony by stating (Rec. 278-279) that their purpose in panning the Wickman and Peabody placers at this time was to discover whether there was enough gold there to pay for working by sluice boxing.

The witness shows that "about three weeks" before he gave his testimony he panned upon both placers and found gold on the Peabody, personally (Rec. 291), and also found gold on the Wickman. The witness further explains the reason why he did not work the property by hydraulicking (Rec. 293) was that at the time "I hadn't the money to furnish the material to go ahead with it."

Mr. Peterson and the witness were upon these properties with a purpose—they were looking for a place to use sluice boxes and this explains the thoroughness of the examination made by this witness in 1898. The witness shows throughout his testimony in chief, and particularly his cross-examination, that he was altogether at home in placer by hydraulicking. He gives it as his opinion (Rec. 285) that there was plenty of water upon these placers for hydraulicking purposes; that the "soil is adapted to hydraulicking; that the Nespelem, as far as I have seen—it, is straight, almost straight gravel and could be very easily hydraulicked" (Rec. 282), that "the Wickman and Peabody placers could be hydraulicked;" that the placers "are both well located

for hydraulicking" (Rec. 284); that "they are situated to have a good dump" (Rec. 284) "in the Columbia river."

The witness then shows that he had prospected above the placers upon the Nespelem river (Rec. 280), that the Nespelem river runs through a mineralized country bearing gold, silver, copper and nickle (Rec. 285); that the Little Nespelem, a branch of the Big Nespelem, also "runs through a gold, silver and copper country" (Rec. 285); that this witness in prospecting, had found placer gold along the Nespelem river, "about 13 miles above" the placers in question (Rec. 285), that he had also prospected along the Little Nespelem and had found gold. The witness further shows that in 1898 and thereafter, it was the general reputation among the miners which "seemed to be in general with all prospectors of the country," that in the Nespelem bar "there was plenty of gold there to pay to work" (Rec. 287).

The witness also shows that there was also a bar at that place called "Stevenson's," which was "somewhere in the neighborhood of about 6 miles above" from these placers (Rec. 288); that this bar had been worked over as placer ground (Rec. 288); also referred to by Dr. Hudnutt, pages 525 and 526; that there was a bar below the Nespelem on the Columbia, *viz.*, "Hopkin's Bar" (Rec. 289) that had been worked and that there was

placer mining in 1898 on the Columbia river below the Nespelem, by panning and rocker (Rec. 290).

As a part of the direct testimony of this witness, and based upon an experience and knowledge revealed by his testimony that must be undoubted, this witness testified (Rec. 292) that in his opinion beyond the facts testified to by him relative to these placers "a reasonable individual would be justified in the expenditure of time and labor in the development of these two placers." Further, the witness states (Rec. 292) "that it would pay to spend money working there, it would pay,—a good paying institution," and the witness further answered affirmatively (Rec. 292) the question whether in his opinion these placers "could be worked in such a way as to render a reasonable profit."

The cross-examination of this witness added to the strength of his testimony. It showed from its beginning (Rec. 293) that he was not only familiar with the mechanical phase of hydraulicking, but was thoroughly familiar, by reason of his extensive observation and experience by reason of having had charge of such work, with the actual process of hydraulicking. His detail testimony given upon cross-examination, shows very clearly that this witness was thoroughly conversant with placer mining by panning, sluice boxing, rocking and hydraulicking methods, and that his testimony with reference to the availability of the Peabody and Wickman

placers for exploitation is most convincing. Of course, in view of the fact that witnesses for the complainant, especially witness Stevenson, have admitted under cross-examination, that these placers present most admirable qualities; the testimony of this witness on this head is not necessary, but it has a value of its own in relation to his other testimony, inasmuch as it indicates the reason why this witness did not locate and placer mine this property in 1898. This witness was upon this property in March, 1898, before the Reservation was open to mineral location, and as testified to by him, he and his partner returned to it in July of that year, after the reservation was open to mineral location. The witness testifies without hesitation that they had in mind at the time of their first trip to the placers, to return to them after the Reservation was open inasmuch as they had been told that there was "sluice box diggings there (Rec. 327). There is in this situation, a most cogent circumstance. Here were two average men, and judging from the character of the testimony of this witness, men of more than average common sense and mineral knowledge, influenced by statements made to them with references to this property, examining it casually in March, 1898, holding the placer possibilities of this ground by sluice-box methods in their minds and intentions for several months, returning to it when the reservation was opened, and then prospecting upon it very thoroughly for a period of a week to ten days

before determining that it could be made profitable by sluice-box methods. We must believe the testimony of this witness upon this point. To this witness and his partner at least must be ascribed the conduct of rational men, and we find these two reasonable men influenced, as were the defendants in this case, by the mineral character of the surrounding country, of the Columbia and Nespelem, by the gold which these witnesses found upon the property, by the common reputation as to the presence of gold in this property, and by the topographical features of the placers with relation to the water, in such a way that it was only after a most careful examination that they determined that they could not make sluice-box mining profitable upon this property. It is to be noted, however, that the witness is confident and apparently was confident at that time that the property could be made to pay by hydraulicking. They had gone into that country with horse, pack-horses, tents and blankets, picks, pans and shovels, for prospecting purposes, but as is true in nearly all such prospecting trips, they did not have with them either mechanical facilities for hydraulicking or the money necessary for hydraulicking. The witness states (Rec. 309) that "the reason is I didn't have money to go ahead and put in a dam and get pipe for to hydraulic it." Further, it would have required lumber, a dam, hose, a pipe and a giant (Rec. 310), and as shown elsewhere in his testimony, would

have required the employment of other labor, inasmuch as two men were insufficient for the working of a hydraulicking proposition (Rec. 321). The witness stated (Rec. 321) in connection with this, that "it is a slow operation for two men to go ahead and we didn't have the money to hire more." The item of expense for pipe alone, as shown on page 324 of Record, would have been a very considerable, for witness shows that the amount of pipe required would have been "in the neighborhood of somewhere close to 3000 feet" and 3000 feet of iron pipe would have cost a considerable amount of money, especially after adding to it the cost of freight and overland transportation by wagon to this point so far remote from the railroad transportation. Therefore, the failure of this witness and his partner to undertake, the, to them, gigantic undertaking of hydraulicking this property has no significance and does not in any way weaken the value of this witness's testimony under this head. The witness shows that in the John Day basin, he had placer mined profitably "upon three-month seasons" (Rec. 293) and that they moved soil there "under a 50-foot head," which soil was much more difficult to wash than would be the soil upon the property in question (Rec. 343). Furthermore, in drawing a comparison between the John Day basin placers, which this witness testified had been worked profitably at 6 cents per cubic yard (Rec. 343), this witness showed that on the Nespelem placers "there is more water, the water can be

used steadily here the whole year round, while there we only used it about three months in a year," and further stated that on the Nespelem placers there was "a bigger head of water" (Rec. 344). The witness further shows (Rec. 337) that the soil of the Wickman and Peabody placers is "adapted to washing very easy with water * * *, is very easily washed off" (Rec. 337). The witness further shows (Rec. 338) that while 6 cents a cubic yard was "sufficient for hydraulicking" it was "not for sluice boxes," which verifies our former conclusion on this head. The fact that the witness did not sluice box this property does not indicate that in his view, the property was not a favorable hydraulicking proposition. The witness states (Rec. 316) "I have hydraulicked where the estimate was only 6 cents (a cubic yard) and made good money at it," and he states on the same page "if you find anywhere there is a hydraulicking proposition, if you find 5 or 6 cents a yard it is enough."

The witness shows throughout his testimony on cross-examination that this property was admirably adapted to placer mining. His testimony shows the presence of enormous quantities of gravel throughout the placers, showing in all the ravines and along the Columbia river, in the deep gulches that open into the Columbia river at the end of the Wickman placer, in the various prospect holes dug by this witness and his partner, and espe-

cially in the 60-foot (Rec. 318) gravel bank on the south side of the Nespelem river, the prospecting done by this witness and his partner shows gold in the gravel wherever it was prospected, sometimes being the flour gold of the Columbia, and at other times the more coarse gold of the Nespelem; from this witness's testimony it is fair to infer that this Nespelem bar probably formed in the past by the conjunction of the Nespelem and Columbia rivers and by the action and effect of prehistoric glaciers, has had placed within its mass during the centuries which have passed, a considerable body of gold, and from his testimony and the testimony of all the witnesses for the defense, it is safe to assume that this gold in fine particles permeates the entire mass of this placer with perhaps the exception of the silt soil which covers at least a portion of the placer in a thin layer, and which appears to have been that which witnesses for the government examined rather than the gravel. From his testimony, as well as by concessions of other witnesses for the complainant, these bars, with the flow of water from the Nespelem, are without question ideal placer locations, so admirably adapted to hydraulicking that anyone with even a knowledge of the fundamental features of hydraulicking would at once determine that this property was admirably located for hydraulic-mining; added to this is the general reputation among miners relative to this property, that it would bear gold and that reasonable men, whose busi-

ness was mining, seriously and carefully examined this property with the purpose of attempting to mine it in a manner admittedly less profitable than would be the hydraulicking process; further adding the testimony of this witness relative to successful placer mining under less favorable circumstances at Stevenson's ranch about 6 miles away, and at various points on the Columbia, and the further fact of the highly mineralized character of the Nespelem and its branches and the country through which it flows, and the further fact that among other minerals, gold appears in quartz mines adjacent to these claims; further adding the testimony of this witness with reference to profitable hydraulic mining in the John Day basin under much less favorable circumstances upon a yield of 6 cents a cubic yard—considering these various phases of testimony, one must concede the reasonableness of this witness's faith in this property, and one must also justify the defense in believing that this property possesses valuable possibilities.

The witness testified that the amount of gold lost in hydraulicking was about 1 per cent of the flour gold and that hydraulicking was an economical method of mining (Rec. 300). The attention of the Court is directed to this at this time for the reason that hereafter it will be shown conclusively by the testimony of other witnesses that the quantity of gold found in this property was much more than sufficient to pay 6 cents per cubic

yard, and that therefore this defendant was and is justified in its belief that the Nespelem properties did constitute valuable placer gold properties.

The attempt of the Government to create a mountain as to an orchard upon Condon's field, was rendered altogether futile by the testimony of this witness (Rec. 335) where he states "there is a few scrub trees around the house," and in answer to the inquiry "What would you call it—an orchard—you wouldn't call it an orchard?" the answer came "I don't know as I would, for last summer he went and tore up a lot of the trees there and said they didn't bear now; a few of them did." As a matter of fact, the attitude of the mind of this witness is the attitude of mind of the defendant company and its officers. This, with reference to the availability of these placers for agricultural purposes, is well illustrated by the testimony of the witness (Rec. 337) when asked whether Stevenson's place was sage brush land, he responded, "I suppose it was, I don't know, I am not a farmer and I don't know anything about farming (my business is mining)." Some of the defendants—all of them, as is shown in their testimony, were engaged in mining as their sole occupation, and although they are a mining corporation, like all mining corporations, it enables them to do all kinds of business in all parts of the Western Hemisphere, their sole activities were mining activities, either quartz or placer, and

there is an entire absence of evidence—not even a scintilla of evidence appears—to show that the defendant or its representatives have in any way attempted to use or considered this property other than in a way adapted to mining.

L. K. ARMSTRONG'S TESTIMONY.

When the Court has read the testimony of this witness, there can be no doubt as to the placer mining possibilities of this property. He spoke from 20 years' practical experience in his profession as a mining engineer (Rec. 655), and from placer mining in the Black Hills, in the Swauk District in Washington (Rec. 656) and at various other places (Rec. 658). He has had actual charge of hydraulicking operations (Rec. 656), had examined placer properties in Montana, Idaho, Washington, Oregon and British Columbia (pages 659 and 660), and his testimony, direct and cross, shows conclusively that he is the master of his profession; that he is a member of the American Institute of Mining Engineers and of the Canadian Mining Institute (Rec. 660). He was upon the property in question three days and made a careful examination of the property, by panning both placers. His testimony shows very clearly that this property is most favorably located for mining, that it is composed of a tremendous over-burden of gravel, and that from every standpoint it is ideally located and adapted to placer hydraulicking (Rec. 667).

The witness shows that in the Swauk District (Rec. 658) the cost of mining was ten cents per cubic yard, while in Southern Oregon (Rec. 659) the cost was "about 5 cents per cubic yard." The witness, after showing prior examinations of other placer properties as an expert "for the purpose of reporting to other people on the advisability of investment" (Rec. 659) and of this property, gives it as his estimate that these placers could be worked at "not to exceed 4 cents per cubic yard" (Rec. 670). This is fully substantiated by the testimony of complainant's witness, Stevenson, referred to hereinafter. He disposed of the inference sought to be created by complainant that the improvement ditch No. 3 running across these two properties was intended for irrigation purposes, by showing (Rec. 671-672) that this ditch was "available for placer mining purposes upon these two placers," and by showing its proper presence in a scheme of placer mining upon these properties (Rec. 672).

The witness after showing satisfactory experience in panning shows that he panned on this property (Rec. 672) and found gold (Rec. 672), that he weighed 17 of the colors found by him and they weighed "a trifle over one cent" (Rec. 673) and "three of these pieces weighed one-half cent" (Rec. 673), and that the average pan gave "12 particles" (Rec. 673). The complainant, it has been shown heretofore, had testified that there were 150 pans in a cubic yard. Upon the basis of this aver-

age the estimate made by this witness that the value of this property per cubic yard would be 12 cents is a reasonable estimate (Rec. 674). This is shown in the examination of this ground by this witness and professional thoroughness in marked contrast with the cursory examination of certain of the witnesses for the complainant. Witness Comerford, for instance, says (Rec. 176) the mere "condition of the soil and the place was such that any person who had experience or an observing man would never look for gold there" (Rec. 176), while this witness traversed the whole property in detail, examined the ditch in detail, the ravines, the gulches, the banks, the gravel in natural and artificial exposures, personally panned "on the ground 12 pans" (Rec. 624) and "superintended the panning of about 40 more pans (Rec. 624 * * *. I was not only present but I saw it done." Moreover, this witness spent three days on the claims (Rec. 636) making this examination. He had assistance and was not "hurried," as were Messrs. Collier and Goodwin, according to their testimony heretofore referred to, but made a most careful examination.

This careful examination showed that "the greater part of them (the placers) was underlaid with gravel—
* * * *I believed it to be equally true as to both claims" (Rec. 700); which gravel, the witness shows (Rec. 703) if in "large banks or

gravel deposits" (Rec. 703) can be "most economically worked by hydraulicking" (Rec. 703). The witness shows (Rec. 674) that at one point on the Nespelem there was a gravel bank "more than 75 feet high" and establishes the fact by a photograph (Defendant's Exhibit "K"; Rec. 674 and 675), and that "the bench was made up almost wholly of gravel except at specific points" (Rec. 717).

As reflecting upon the omission of the defendants to do more than they had done towards equipping the property with a hydraulicking outfit, the testimony given by the witness (Rec. 737) in connection with the testimony of Wickman, discussed heretofore, frees the defendants from any suspicion. He shows under a searching cross-examination (Rec. 735) that the cost of such equipment as was considered installing was very large, that the flume, a part of the bed of which the defendants had already blasted from the rock, would cost about 40 per cent (Rec. 738) of the whole; that such a flume was necessary (Rec. 738); a trestle (Rec. 738) and bridge work would cost "at least 25 per cent of the cost of the flume" (Rec. 739), and the witness says that he did not include the trestle and bridge work in his estimate (Rec. 739), and he did not include the expense of the improvement ditch already constructed (Rec. 740), although he did include the cost of connecting it over the ravines (Rec. 740), the sluices would add to the cost over \$1000.00 (Rec. 744), and

about 3000 feet of iron pipe at more than \$2.50 per foot would be necessary (Rec. 742), the minimum number of feet being 3000, and the minimum price being \$2.50 per foot (Rec. 743), two gates \$300.00, a standpipe, over \$300.00 (Rec. 743), two giants, five air escapes \$125.00, lighting plant for night work (Rec. 744-745) \$500.00, power plant for sawing lumber (Rec. 750) about \$2500.00 installed (Rec. 751), building and shops and tools (Rec. 751), "half a dozen buildings—might be more" (Rec. 752), including "blacksmith shop and repair shop" (Rec. 752)—all these at "five to eight hundred dollars apiece" (Rec. 752)—all this expense when measured against the cash in the possession of the company as shown by the testimony of the treasurer, Wickman, shows very clearly why this company followed the usual history of nearly all mining companies in this and the adjoining states—*i. e.*, proceeded slowly, hampered by its lack of money, and rendered cautious, as even miners are, by the knowledge that in addition to this large expenditure, there must ensue a long period of time when the cost of operation would be very large. In view of this handicap, this defendant is to be commended for proceeding in the way in which it did—blasting out the flume, preparing the dam, and preparing the foundation for a small power plant whereby the company would be enabled to do the preliminary construction work necessary in the course of equipping the property for hydraulicking.

Much has been made of the possibilities of power development and distribution from the water power, always by way of insinuation (Rec. 749). This witness disposes of this (Rec. 749) where he says, that such a thing would not be possible from the water power "and operate the placer" (Rec. 749); "I do not see where there would be water to do it with" (Rec. 750).

Something of the placer possibilities of this property is revealed by this witness when he shows (Rec. 733) that there are "a good many million cubic yards," and "over ten years" (Rec. 750) work to work up this ground, working by day, and also at night by the light furnished by the lighting plant.

It is apparent, too, that the defendant has at all times had *bona fide* in mind the exploration of this property as a placer, for it appears (Rec. 768) that the company had "under the instructions" of the witness "and independent of them * * * made numerous and various widely separated examinations of this property" (Rec. 768) and furthermore, he had suggested and the company had "intended to sink holes in the ground and take samples" (Rec. 769), all of which is corroborated by Dr. Hudnutt's testimony later. The fact that this defendant had consulted this expert mining engineer in this way, is significant of the good faith and fair hopes of the defendant in this matter. .

Beyond doubt, we are justified in claiming, this

witness establishes the presence of gold in this property by a personal investigation, the hydraulicking feasibility of these placers by an abundant supply of water, their location, and the possible profitable working of the property by reason of the nature of the gravel deposits underlying this property; he further shows the relevancy of the work done by the defendant, the scheme of hydraulicking these placers, and adds to the expert and non-expert testimony already in the case, the weight of his professional opinion that these placers can be worked profitably.

TESTIMONY OF JOSEPH KROLL.

John Kroll, a rancher at Coulee City, who also owns three quartz claims at Nespelem (Rec. 823) and who had mined since 1880, testified (Rec. 824) that he had been acquainted with the Nespelem country for 11 years, that he had had experience with gold placers in Wyoming and Montana and had "prospected a good deal on the south half of the Colville Reservation" (Rec. 824). He testified that he first was on the ground covered by the placers in question "October 1st, 1898," prospecting, and had at that time prospected from "below the mouth of the Nespelem" (Rec. 825) to "some 30 miles above" (Rec. 825) and at that time "panned along the Nespelem river from the falls down to the mouth and found some good results" (Rec. 826)

and "down the Columbia * * * past the property" (Rec. 827) and "found good results" (Rec. 827). "Gold colors." He was upon this property at that time from October 15th to November 11th, and in his panning along the Nespelem he said that he "found from 1 to 18 colors of flour gold" (Rec. 828). He says candidly, "I didn't count the colors, simply they were there and I didn't count them" (Rec. 827). Despite the volunteered statement of witness Comerford that no observing man would look here for gold, this prospector of years of experience stopped on this property and he says, "my intention was to find gold there and make a location" (Rec. 828), and he did locate on the property, making three locations on the property, the Sunrise, Monday and Ditto, on October 13, 14 and 15, 1898, the witness refreshing his recollection by a book memorandum made at the time (Rec. 829). He intended to work these locations, but was unable to do so because he did "not have the means" (Rec. 830), although he went to Farr Bros. at Keller and applied to them for assistance. The circumstances of this narrative shows its truth. The witness collected gold from these claims at this time (Rec. 831). He had panned upon the property before locating (Rec. 864) and after locating, he did "some prospecting * * * on the claims that I located" (Rec. 846). The witness found that to get the water on the placers he "had to get this water out through a hard granite point * * * (as it was) too

expensive'' (Rec. 859). The witness speaking of his panning in 1898 said, ''I could find gold, actually there was a string in the pan probably six inches of this flour gold—it is just like flour and you can see a yellow streak of it, but you can not count the colors'' (Rec. 845).

The witness then showed (Rec. 832) that he had panned ''last October (1909) ''about eight pans'' on this property and found gold (Rec. 832) on the Nespelem and on the Columbia, and in all but two or three he found gold from one to six colors in a pan. Furthermore, the witness gave into court defendant's Exhibit ''U'', containing the gold which he had found in those ''five or six pans (Rec. 834), the witness saying that 45 of such colors would make a cent, which at 150 pans to the cubic yard, and one to six colors per pan would yield from a lowest possible minimum of 3½ cents to 21 cents per cubic yard.

Adverting to the testimony of Mr. Stevenson, which the witness had heard (Rec. 837), the witness said that ''it is almost impossible for a man to pan down the Nespelem river without finding colors'' (Rec. 837). The witness in the same connection said, that ''a man could possibly pan twelve pans and miss it if he would take from the top gravel'' (Rec. 737). This, together with his partisan attitude, explains why witness Stevenson did not find gold. Kroll's testimony as to his earnest efforts to exploit this property in 1898-1899, and the

circumstances of his testimony—the note book, the Farr Bros. application, the proffer of gold actually found upon his last trip—and the careful examination made in 1898, the responsible and unbiased character of the witness, urge us to give his testimony full credit.

The attempt to fix upon this defendant a fraudulent irrigation scheme upon these placers as alleged agricultural ground is fully met by this witness (Rec. 835). Attempts to farm it had been made in 1898, with a result of “nothing” (Rec. 835); and on the adjoining land of Condon’s an attempt had been made to raise grain, but, in the language of the witness, “didn’t raise it” (Rec. 836). There is no other “agricultural land” near this property “save across the Columbia, distant 5 or 6 miles” (Rec. 836). The witness said (Rec. 855) that the upper part of the placers was too coarse and sandy to raise agricultural products. He shows that on Condon’s field adjoining the soil contains “some black soil” (Rec. 857), that there is a kind of “sheep grass” growing there, and a poorer kind upon this property, and that apparently the only garden stuff grown near Nespelem is for the use of the owners (Rec. 858). Apparently the suggestion that this land is capable of agricultural use is based upon rather conjectural grounds. As bearing upon the value of the gold found by this witness (Rec. 751); *i. e.*, one-half cent in eight pannings, this would more than make this property valuable for it

would show a result of 10 cents per cubic yard, as 2 or 3 pans were blank, much more than is necessary according to the estimates of the cost of hydraulicking this property by even Stevenson and by the other witnesses, to justify exploiting this property.

The inference sought to be created elsewhere that the gold in evidence must have been "salted" or surreptitiously placed or added to is again made (Rec. 852), and is squarely met by the witness (Rec. 851) where he says "I could not pan down there (down the river) without finding something," and by his testimony that the 30 to 50 colors of gold present in the small bottle referred to, had been found by him, placed by him "in the bottle" (Rec. 851-852), and that he had had sole charge of it and them ever since (Rec. 852).

We suggest that here is a reasonable man, of apparent thrift, and with practical mining experience who did controvert squarely the broad and ready conclusions—statement of witness Comerford that no observing man would look for gold here, and who, by finding gold, shows either that the "search" for gold made by Messrs. Collier *et al.*, was hurried and hasty, as is admitted, or that it was superficial by reason of partisan conclusions or by reason of a lack of knowledge of local conditions necessary for them to make an intelligent series of panning. This man's testimony is true and it justifies this defendant.

TESTIMONY OF THOMAS B. EARLY.

Mr. Early has been engaged as a miner for about 35 or 40 years, in Colorado, Utah and New Mexico, and in Washington (Rec. 382)—placer mining in Summit County, Colorado. He was upon the property in question in 1900, and in 1901 prospected them for gold (Rec. 384-385), having previously heard favorable reports of them and of the Nespelem region (Rec. 385), panning along the Nespelem and obtaining gold (Rec. 389); also panning at the time on the north side on the "first bench above the river" (Rec. 390), the "particles of gold" found being "bright and pretty good size" (Rec. 391) and averaging "five or six colors" (Rec. 392); he panned on the Peabody at this time at a depth of about two feet found in the one pan taken therefrom "three or four colors" (Rec. 393). He also, at the time, panned three or four days, principally on the Peabody placer (Rec. 393) and prospected also on the south side of the Nespelem (Rec. 393). It appears that he "panned 50 or 100 pans" at this time, getting "several particles of gold in nearly every pan" (Rec. 408) and after location, he panned "400 or 500 pans practically" (Rec. 409) during the month he was there. "I was panning every day more or less right along" (Rec. 409). He also panned on the Wickman as well, "three or four days" (Rec. 408) and found gold (Rec. 408). The witness thought the property "would pay to work" (Rec. 411)

and after "panning it to make sure it would be a pay" (Rec. 411) after location, he came to the conclusion that "by getting the water on the ground it was good property" (Rec. 411). It is noted, too, that, after locating, this witness did not rest,—he made a most extensive panning examination of between 400 and 500 pans to see whether it was worth while continuing to hold the property. The great, overwhelming majority of lode claims, which have been patented, have not paid; but their locators and patentees, and the locators and patentees of the Nespelem bar, have been justified in relying upon the appearance of things and *if mineral indications were present the patents were valid*. This witness found colors in the shafts sunk on the Wickman and Peabody (Rec. 434) and in the ditch, five in one pan and seven in another (Rec. 437) in the discovery shaft of the Wickman where he found gravel (Rec. 439). He panned "all over the bar * * * the whole thing, the Wickman and Peabody placers * * * (and) the excluded strip (to the Columbia)" (Rec. 473-474). And he said that he had at that time made up his mind that "if it was handled properly it would pay with the amount of water and the advantages of being worked" (Rec. 474). This witness was sanguine at one time that the property could be "worked by ground sluicing" (Rec. 447-448), although the scheme naturally favored by all was the much better and more effective hydraulic method. This, however, shows, in a strong

way, the candor of this witness and the faith of this old prospector and miner in this property.

The placer experience of this witness before going to Nespelem had not been extensive, perhaps,—“three seasons” in Colorado (Rec. 383), his work being “doing a little of everything” (Rec. 416), “shoveling bedrock and running gravel into the flumes, and so on” (Rec. 416) and “all kinds of work excepting I had nothing to do with hydraulicking” (Rec. 416). But the essentials of a good hydraulicking proposition are so well known, the process of operation so simple—at least to one who has had the opportunity of a short observation and who possesses average mental faculties—that anyone could say after a most casual observation of these placers, that they possessed most excellent hydraulicking features. So that we must conclude that this witness, though not an expert in running hydraulics, was qualified to determine the hydraulicking possibilities of this property—qualified equally one must conclude with the complainant’s witness, Stevenson, who, after one visit, concluded that it had ideal hydraulicking features.

Nor is it a necessary element or pre-requisite to the reaching of this conclusion by this witness that he should have determined a definite and final campaign for the hydraulicking of this property, with *the one* of various possible starting places for hydraulicking in mind—with exact size of giant, hose, flume and pipe figured to

an exactitude in inches. The very fact that this witness did not come into court with a finely worked-out scheme, developed in minute details, for the hydraulicking of this property, adds weight to his testimony, for note how it articulates with those other circumstances of this case, which must have affected this witness's inclination to work out such a plan, he was a "superintendent"—the facts show nothing more than the "boss" of mining laborers, Dr. Hudnutt was manager, Mr. Armstrong was the engineer to whom all these matters would be referred finally, and their financial conditions had always been such that the company had not come to that last day (which comes finally prior to the actual execution of any work or task) when it must determine the question of whether the pipe should be 6 or 8 or 9 or 10 inches in size, the giant of one or another dimensions, the flume of planks 14 or 16 feet long, nor had the time come when they must determine—that which all the testimony shows is a matter of indifference in view of the several possible places available—the exact spot, geographically, at which they would first squirt the water from the "giants."

A further attitude taken by the complainant, at the hearing involves equivocal positions. After this witness had testified that, in his former experience he had "had nothing to do with the hydraulicking" (Rec. 416) complainant's attorney contended that he had shown him-

self "incompetent" to testify to "hydraulicking" (Rec. 416).

If the ditch which crosses the two placers had no proper relation to the improvement of this property and to its development as placer ground, the representatives of the defendant when they offered it, in the patent application and proceedings, openly and candidly, as an improvement for mining purposes were inviting this litigation. That it has its relation is clearly shown by the testimony of the several witnesses. So of the flume bed; so of the fact of the box sluicing along the creek. It was possible for this witness to testify, if he so desired, and without the possibility of being controverted by the Government, that this box sluicing had been done before "the investigation of this case" (Rec. 421), but the witness answered candidly that the time had been, "a year ago last spring" (Rec. 421) "after the investigation in this case" and that they had "never worked it any since," the reason probably being that everyone appreciated that the hydraulicking was the only practical method, as ground sluicing doesn't handle dirt as "cheaply" as hydraulicking. However, they found gold during this sluicing with these sluice boxes which, it is shown by complainant's witnesses, were found along the Nespelem on the placers.

But despite the fact that this witness was not called upon to devise a detailed scheme for the hydraulicking

of this property, he explained repeatedly the simple method of hydraulicking this ground. Counsel's examination was most unsatisfactory, and it is impossible to understand sometimes whether he is asking the witness as to a detailed plan actually by the witness, or as to a plan which might be adopted. The witness also answered counsel, as inexperienced witnesses do most frequently without noting the turn of the question from one meaning to the other, but his testimony shows most clearly that he was not an expert placer miner—just “a practical miner,” that he had never planned a hydraulicking system for the placers in detail, and we concede most truthfully that he had never decided the question which complainant's counsel seems to think so momentous, the size of the iron pipe (whether 6 or 8 etc. inches), the exact length of the flume, the number of gates, the size of the “giants” or the exact spot where hydraulicking would begin. This was not his workers “several times” and that the company was at work; the evidence shows that he and the defendants were sensible enough to have in mind the necessity of consulting engineers (see Testimony of Armstrong) and these matters, it must be obvious, were not a nature rendering any particular decision of particular moment.

The testimony of this witness shows the reasons why the property had not received more development “for the want of funds” (Rec. 510). He shows how this lack of money compelled the reduction of the force of

heavy expense in its lode claims and tunnel. His testimony on this head in connection with that of Wickman as to the finances of the company and of Armstrong as to the cost of hydraulicking equipment, shows most clearly why this company has not done more development of this property. Further, this litigation would also probably have its natural deterring effect upon the expenditure of the money of the corporation upon this property. It is clear that nothing was developed in the testimony of this witness or in this case to indicate that he had any purpose of irrigating this land.

TESTIMONY OF CHARLES M. WHITE.

Mr. White, a resident of Nespelem and engaged in mining there for ten years (Rec. 347), and who had come to the Nespelem country ten years ago (Rec. 347). Before this he had had experience in placer prospecting on the Sixes river in Oregon (Rec. 347), and later on, in May, 1900, together with a Mr. Nichols and Mr. Brown, he had panned upon the property in question (Rec. 348), panning on the north and south side of the Nespelem river (Rec. 348) and found gold—"coarse gold and some fine gold" (Rec. 349), the pans running "from 1 to 15 colors," and "sometimes more" (Rec. 349). They also panned up on the level part of the Peabody (Rec. 350), panned in the ravines and "found gold" (Rec. 350), the average of colors being "about 6

or 7 colors to the pan" (Rec. 350). They panned the surface of the Wickman and in the gravel of the Wickman (Rec. 351) finding more gold in the gravel than on the surface (Rec. 351) and not finding many colors on the surface (Rec. 351). They sunk one shaft on the now Wickman placer to determine the presence of gold the "gravel that shows on the river bank" (Rec. 351), went down 14 feet, found gravel, and found gold in that gravel (Rec. 352). They also found gold in the gravel in the ravines (Rec. 350). He panned about 50 pans (Rec. 353) at this time, and he and his companions located three claims upon this property, south of the Nespelem (covering that part which has the high bank of gravel), one on the ground now covered by the Wickman and the third on the Peabody (Rec. 354). He showed those indications of underlying gravel (Rec. 354-356) along the Nespelem, in the ravines and along the Columbia, testified hereafter by other witnesses, and as shown above, showed the presence of gold in this gravel wherever it was exposed, either naturally or artificially. The surface being covered with sand, his testimony that little gold was found on the surface is most creditable. He shows the mineralized character of the country through which the Nespelem river runs (Rec. 356).

He panned at a later date (Rec. 357) on the Peabody and got gold (Rec. 357) panning north of the cabin and on the south side of the Nespelem "7 pans" (Rec. 357),

and he says "I got gold"—"found gold in all of them" (Rec. 358). Being shown defendant's Exhibit "A", he identified the gold contained therein as gold found by him on the Nespelem placer, the "largest one * * * on the north side of the Nespelem * * * a little above the cabin * * *. The small one * * * on the south side" (Rec. 359). The testimony of Wickman corroborates this last evidence. Counsel for complainant attempted, on cross-examination, to weaken the effect of this part of witness's testimony by leading the words of the witness into statements which might permit the gratuitous suggestion that Dr. Hudnutt or Mr. Wickman had "salted" the pan, but the witness's testimony (Rec. 372-373-374-375) shows that all parties were busily engaged in independent pannings at this time, and that witness White first discovered the presence of these small nuggets. In this case defendant has brought to the court evidence of independent witnesses, who were especially equipped by reason of past personal prospecting upon this property to speak from a knowledge acquired at a time when there could have been no temptation to bias. Too, there appears in the testimony of this witness an unusually strong circumstantial, corroborating fact to verify his testimony—*viz.*, what he saw of this property persuaded him (as well as his two companions) to locate placer claims upon this property, and to file his location notice (Rec. 353) after having staked it (Rec. 353). They were looking for box

sluicing at the time and finally determined the property could not be worked profitably by box sluicing (Rec. 366), and as they didn't have the money necessary for hydraulicking it (Rec. 368) they abandoned the claims (Rec. 367), although he thought at that time and now (Rec. 371) that "with the water they have got there, it is my judgment it would pay" (Rec. 370). This witness made the obvious and necessary reply to the inquiry why they had not located a larger area, that twenty acres "is all the law allows" one person to locate (Rec. 377). Here is, as shown elsewhere, the conclusive answer to the criticism that the patent did not cover the "excluded strip" along the Columbia, as shown elsewhere, when the survey was made before patent, this excluded strip, although located, made the total area too large (to the extent of its area), and area of placer ground to be located by the number of locators, and therefore the survey lines were drawn to accord with the law giving to each locator no more than his legal 20 acres.

The testimony goes far to sustain the belief of the defendants and of all these witnesses that gold is diffused throughout the whole mass of these placers under the sand at the surface—that, like the placer at Stevenson's, formerly profitably worked out at an elevation above the Columbia of perhaps 75 feet, and only about 5 miles away from these placers, that these placers have had deposited in them the gold now found there, at a

time when natural conditions permitted the deposit of gold at such an elevation. This is borne out by the testimony of Collier, especially to the finding of gold on the benches and terraces above the Columbia.

TESTIMONY OF DR. F. O. HUDNUTT.

This witness, a regular physician, had engaged in mining and prospecting intermittently since 1884, and continuously for the nine years last preceding the giving of his testimony (Rec. 516) had gone into this country in '84 (Rec. 516) prospecting for "quartz and placer" (Rec. 517), being there about two months, he found gold in panning, on that trip, on the sand bars of the Columbia (Rec. 518). He located a quartz claim in Cedar Canyon district, and "became manager of the mine to open it up" (Rec. 518). The next year from Eureka, California, he prospected across the Siskiyou range for placer, but "mostly for quartz" (Rec. 520), going thence to Cornucopia camp north of Baker City (Rec. 520), not doing any placer prospecting at that time (Rec. 520), and in 1890 or 1891 he went into the Okanogan and Similkameen, prospecting for quartz and placer gold (Rec. 521) on the north side of the Similkameen river and "various places" (Rec. 521), finding some gold, being on this trip about 3 or 4 months; thence on a prospecting trip to the Bear Paw mountains in Montana for "quartz placer (Rec. 521), and to Butte, thence

to Logan, thence "into a camp in the Wasatch range in Utah, thence to Cripple Creek, prospecting—this being 1893 or 1894 (Rec. 522). He then went to Clear Creek, Colorado, and "brought out" a gold placer, and remained there all summer (Rec. 522); thence prospected on Mount Blanco, Colorado, for about 2 or 3 weeks (Rec. 523) and then placer mined (presumably prospecting) "all over" Summit Co., Colorado (Rec. 523). He then organized a prospecting company, and went into Idaho, Big creek and Snake river, did some panning, "saw some (gold) there" (Rec. 523). Then again he organized a prospecting company and went up to the Nespelem, this time they stopped at Stevenson's Ferry, where other testimony shows as does this witness's testimony, that a placer had been worked out, this being on the Columbia about 6 miles from the property in question. The witness walked over the placer at this time, which was about 10 to 15 acres in extent. He at that time talked to Mr. Stevenson, and was told that he had seen them working the bar (Rec. 526) and that he, Stevenson, had "shipped out their gold" (Rec. 526). This is relevant and of some weight as showing the knowledge and belief of this witness and of Early, relative to the gold bearing qualities of the immediate neighborhood of the property in question. It further adds to the intrinsic possibility that the same apparently continuous deposit of gold may have extended at least six miles further down the Columbia. Further this witness

shows that even at high water this worked-out placer ground is "30 to 40" feet above the river, and at low water perhaps 60 feet. Now the same Columbia River flows past the bar upon which is located the Multnomah placer. Both placers—the worked-out ground at Stevenson's bar and the Multnomah—are upon bars adjacent to the river. The river, or some cause, placed gold at an elevation of 30 to 40 to 60 feet above its present flow upon the Stevenson Bar, and it is manifestly most improbable that the Nespelem Bar could have been passed by without receiving a like deposit of gold. This fact of gold found so near, and at such an elevation above the river in the Stevenson Bar, shows most conclusively, we think, the inherent probability of gold being found at like elevation in the Nespelem Bar, and by this probability fortifies the testimony of all the witnesses for the defendant, that they have found gold at the height of the upper parts of the Nespelem Bar as well as at those "more favorable localities" spoken of by witness Comerford, along the river. Further, testimony of witness Collier, before adverted to, shows that the finding of gold even in the upper terraces of the Columbia, is not of infrequent occurrences, and that the lower terraces (among which might be classed the Stevenson and Nespelem Bar) were "progressively richer" than the upper terraces. So that in this region and along this river even a 60 or 80 foot elevation above the river is a matter of indifference in

respect to the probability of gold deposits upon a bar at that elevation above the water, especially as it receives the gold also from Nespelem and tributaries which flow through a mineralized country.

Passing over the property in question on this trip, he was upon the property in July or August of that year (1900), and saw at that time placer location stakes upon this ground (Rec. 528). In this he corroborates the testimony of Gilfillen and White. In 1901 he did his first panning on the property and found gold (Rec. 529). The bar had been located at the same time as the "Peabody" (Rec. 529) and "covered practically all of the bar" (Rec. 530), and included the "excluded strip along the Columbia" (Rec. 530), the Peabody at that time as located being co-extensive with the present Peabody and Wickman placers and the excluded strip. Later in June, 1902 (Rec. 531), the Wickman was located, and the Wickman placer, as originally located, also included "the excluded strip * * * took everything to high water mark on the Columbia river." That this is true is shown conclusively by defendant's Exhibit "E," the plat of the original location. Further, the location notice in evidence shows conclusively also that there were but five locators; the law is that but 20 acres of placer can be located by each locator, and the area of the Wickman as patented, shows that it contains 99.54 acres. Further, the plat of this placer

shown on complainant's Exhibit "4" shows that the original location corner 'at the southwest corner of the Wickman was 728 feet southwest of the Corner No. 3, as at present fixed. These facts without verbal testimony would establish this, but we have the testimony of this witness as well as that of Early, that the reason this strip was excluded was (Rec. 532) that "upon surveying it was found to contain over 100 acres, which is the limit that five persons could locate, therefore it had to be cut off on one end or the other, or one side or the other, and it was cut off from there" (Rec. 532). This agrees with the testimony of Early and further is a necessary deduction from the evidence in the number of names of locators on the location notice.

In May, 1902, he panned both sides of the Nespelem, down the Columbia, on the excluded strip (Rec. 533), gulches on the property, panning on both placers, and finding gold, fine gold and larger pieces (Rec. 533). At this time the secretary of the company, Mr. Peabody, was with the witness and he also panned and found gold (Rec. 533). It appears, too, that Mr. Peabody was "excited over the gold and told (the witness)
* * * to secure patent as soon as possible on the ground (Rec. 535). He panned over the entire property, finding gold in such measures that his opinion, affected also by his general knowledge of the mineral character of the country (Rec. 535-536, 538) was that

this was favorable placer property. His testimony as to the presence of gravel in all parts of the property and especially on the north strip along the Nespelem, sustains the testimony of the other witnesses in this case.

THE TRUE ISSUE IN THIS CASE, AND THE ONLY ONE, IS SIMPLY A QUESTION OF FACT,—*WAS there gold on these claims, and was gold discovered by the claimants and others, as set forth in the affidavits made in support of the application for patent to these claims, or, is it true, as alleged in the complaint of the Government, that each and every one of them so presented and filed with the local Land Office as evidence and proof to sustain said application for patent for said alleged mineral claims, were false and fraudulent in this,—“that these claims did not at the time of these affidavits were made, or at any other time, contain a deposit of, or any gold, all of which was by the respective persons making said affidavits, and defendant well know when said affidavits were made.”*

The burden of proof is upon the Government. It must establish by a preponderance of evidence the truth of the above allegation. The equities of the United States appeal to the conscience of the chancellor with no greater or less force than to those of a private individual under like circumstances. The Government must prove first, that the defendant's representatives

swore falsely, and second, that they knew they swore falsely when they presented their application for patent. Has the Government proven this? We contend that it has not, and wish to show three reasons at least why it could not be and why it was not proven by the witnesses for the Government in this case.

First. The actual time occupied by the witnesses for the Government in panning and prospecting the ground was too limited to prove the mineral or non-mineral character of the ground.

Second. The extent of the examination made by them was still more limited, and the acreage examined would neither prove or disprove the mineral character of even one acre of the claims, let alone the entire claims. On the contrary, Collier testified that there was a pay-streak upon these claims, and as the law requires only one discovery for every 160 acres, the case fails by the testimony of their own witnesses.

Third. The character of the ground chosen for examination by the witnesses of the plaintiff was in most, or many, cases, that least likely to contain gold, yet all the witnesses, except Stevenson, referred to found some gold.

TIME.

The time occupied by Collier and Goodwin (see page 134), according to the testimony of the latter, occu-

pied about one and one-half days. During this time, they identified the stakes and boundaries of over 257 acres of land; they examined the water power and its fall with aneroids; they took the flow of the river (see page 122) and found that it was 50 cubic feet of water in 20 seconds of time, or $2\frac{1}{2}$ cubic feet of water per second of time. They examined a ditch about a mile long, examined the Nespelem River from the falls down to the Columbia, over a mile in length. Their examination of the Wickman Placer, of approximately 100 acres, occupied in the neighborhood (see page 135) of four hours, and, according to Mr. Goodwin (see page 131), they panned from three pits evidently two pans each, carrying them to the river, while Mr. Collier says (see page 70): "I think we panned two or three pits." In the gullies and along the shore of the Columbia they did not pan at all. And this constituted the "careful examination" of the entire claims; for Collier says (see page 70), "we did not pan in the gullies at all, nor along the Columbia River," the reason being probably that gravel was there, and no reference is made by either one that the extensive and comprehensive examination of approximately 100 acres of ground consisted of anything more than the panning of five or six pans, mostly silt and sand, from the prospect holes on these claims—less than 1-25 of a cubic yard. In other words, the amount of dirt which was panned from the claims, and from which this placer was arbi-

trarily decided to be non-gold bearing and worthless as a placer property, could be taken from a hole less than one foot square and two feet deep.

While on the Peabody placer, beginning at a little below the falls to the mouth of the Nespelem, their examination along the bank and in the sand and dirt was confined to four different places. This would average something like one panning every quarter of a mile, and this, with the addition of two or three pannings from the pits (see pages 116-118-119), comprised the total examination of the Peabody placer by Messrs. Collier and Goodwin, comprised their examination of over 157 acres of land, although they spend much time in examination of the water power and other parts of the scenery of the placers.

Mr. Commerford testified that in his examination of the Wickman placer, he bored six holes with a post auger which was 8 inches in diameter; that he took the dirt from the sides of six holes, in a loam soil (see page 167) "nothing gravelly about it," he says. This would make, or equal, a tract of ground 24x16 inches in diameter; as there are 43,500 square feet in an acre, he prospected in the silt, sand and clay of the Wickman placer, according to his testimony, a hole represented by an area of 21-3 square feet, beside he scraped the sides of the prospect holes in the silt and sand. This, then, comprised the extent of his careful exam-

ination of nearly 100 acres. On the Peabody Placer he bored one hole eight inches in diameter a short distance, when he struck a rock and quit; he also took the dirt from two prospect holes and two others, which had been dug (by whom no one knows), which were badly caved in, sacked it and took it to the river and secured the concentrates by panning (see page 164). This constituted his entire examination of over 157 acres on the Peabody placer, yet he found some gold; but he did not pan near the Nespelem river, nor in any of the gulches on either placer, nor on the south side of the Nespelem river, therefore, his careful and extensive examination of over 157 acres of ground which this defendant company had thoroughly prospected in the gravel and found gold in numberless places, was to be confiscated because on a space of ground that would not comprise one-eighth of one cubic yard, he failed to find pay dirt.

CHARACTER OF THE GROUND.

It is significant that in the entire testimony of the witnesses for the defendant, that each one spoke of finding gold in the gravel. Gilfillen (page 271), "we found gold in nearly every pan we took from the gravel bank"; page (272) "we dug down until we got into the gravel"; (page 274) "any place we found gravel, we found gold"; (page 275 "we panned across the line on

the Wickman where it was run down so we could get through the sand easier and get into the gravel."

Witness White (page 351) "sunk a shaft fourteen feet in May, 1900, to determine whether we could strike gravel that shows on the river bank, found gravel." (page 352) "Found gold and located three claims; this was ground now occupied by the Peabody and Wickman placers. (page 355) "The ravines on Wickman and Peabody placers on lower part are gravel, on upper part sand.

Early (page 408) "three or four days before locating found particles of gold in panning the dirt and gravel, panned 50 to 100 pans." "Panned *the gravel* and some of the top surface."

Wickman (page 189): "Q. State nature of soil panned? A. Mostly gravel."

Dr. Hudnutt (page 542): "I panned the top of the ground where there was *gravel*." (Page 583 "I could decide from former prospecting on the bar that outside of the *gravel* the colors would be few and far between."

While Cummerford testified (page 116) "that with the exception of two or three caved-in holes, that his pannings were of silt and sand, nothing gravely about it." He also testified in regard to the bar on which are situated the Peabody and Wickman placers (page 174), as follows: "There is no indication of any condition

that would lead any person to believe that the land contained a deposit of gold or placer gold."

While Mr. Collier, the Government geologist, speaking of the bar on which these claims are located, says (page 77): "The Nespelem bar is formed by the Columbia river, and was probably formed there at a time when the ice gorged the Columbia down below. These materials that make up the clay were deposited there to a considerable height in the valley of the Columbia. Then the Columbia ice got away and the Columbia returned to its former channel and at one time it flowed about on the level of this upper bench that I spoke of and cut off that wide bench back to the foot-hills. It is known that the Columbia has cut down further in its present channel and left the bench above.

Q. The bench upon which the Wickman and Peabody placer are located are then of river creation?

A. Are of river origin; yes, of Columbia river origin.

Q-176. Did you investigate any of the upper benches or bars, or whatever you call them?

A. I investigated them, yes.

Q. What was the result so far as the presence of gold was concerned?

A. The result was that I got less gold the higher up the river I went on the benches. In one or two instances where there was a small stream, I got some pretty good gold high up, over a thousand feet above the river (page 77).

Q. The lower benches are richer than the upper benches? (Page 78.)

A. They are.

Q. What is the reason in your opinion?

A. In my opinion it is because the river has worked over the upper benches to concentrate the gold again on the lower benches.

Q. This glacier period and perhaps volcanic period, does that have anything to do with the Columbia river gold?

A. It had a very little to do with the gold, I think. At the time the glacier was there there was a great deal of material, of course, brought into the Columbia river, and a large part of it has been removed since. That material probably carried some gold. All that gold is perhaps concentrated upon the lower bars now.

Yet on page 61 he says, in reply to a question as to what elevation above the Columbia he found the gold on the Peabody placer, replied: "about 140 feet above the Columbia." This would indicate that the pay streak which he stated covered from one to two acres (page 98) was deposited there either by the Columbia river, or that it came from the mineralized quartz veins lying adjacent to the north and west.

No prospector, miner or mining man would consider the examination by these witnesses of any practical importance as to deciding the auriferous or non-auriferous character of these bars, excepting possibly Mr. Collier's relating to the discovery of the pay-streak covering about two acres.

It is well known, however, that an old river channel or the former bed of a river in a gold-bearing country is much sought after by experienced and successful

prospectors in all parts of the world, and this, according to Mr. Collier's testimony, is what the bar which makes up the Peabody and Wickman placers formerly was, an old river channel or bed of the Columbia river.

CONCLUSION.

I.

When the testimony of the defense is reviewed, one must be impressed with the fact that an actual *bona fide* discovery was made, and that the defendant, in locating and patenting the claims acted in good faith, impelled by the presence of placer gold therein in such quantities as when the availability of a water supply, dump grounds, and character of the material to be washed is considered, made it an ideal placer proposition for hydraulicking. The government failed to produce convincing evidence sustaining the charge of fraud or in any way impeaching the good faith of the defendant company. The examinations of the ground made by complainant's witnesses was too superficial, as is shown by their narration of the manner in which the investigation was conducted, to prove or disprove the mineral value of the land, and as the burden of proof is on the Government the proceedings must fail.

II.

Proof of the agricultural value of adjoining lands could most readily have been produced from the neighborhood, but here, too, the government failed. Exact proof of the potential horse-power present in the Nespelem Falls could have been had, had the government so desired. The flume bed is from 120 to 150 feet higher than the power foundation. Collier testified, page 43, to 175 ft. fall, and Goodwin, page 121, to the same fall, and that there was a flow of 50 feet in 20 seconds of time, or $21\frac{1}{2}$ cubic feet of water per second of time, which with the fall would develop only about 40 horse-power.

III.

Perhaps it may seem unreasonable to the Government that a company which apparently never had \$7,000 in its treasury at any given time, should be delayed in pursuing the further development of the placer property at a probable initial expenditure of \$30,000 to \$50,000 for equipment, and that it could meanwhile preserve its lode claims by doing its assessment work thereon. The conduct of defendant in this respect after the obtaining of patent, is paralleled daily in the history of many mining companies and in business generally under similar financial stress, and is explained by the fear of adversing which was threatened (see pages 585 and 586.) While an equipment much less

costly might work the gravel profitably, Mr. Armstrong's plan was for a very large complete plant, using part of the water from near the upper falls for the giants, and the lower ditch for sluice water after, as on page 769, a more complete estimate had been made of the remote portion of the Wickman placer, which was intended as shown. (See page 546.)

IV.

That this property is valuable as a gold placer is almost a matter of demonstration. It is evident that, if the gold in this property averages much less than is indicated by the testimony of any of the witnesses for the defendant, this property is most valuable. But, assuming that this is not established as an ultimate fact, it has been shown conclusively that gold was present and is present in this property in such quantities as to justify these defendants in believing them worthy of exploitation for gold. The witnesses for the Government as well as the witnesses for defendant agreed that the Nespelem and Columbia river flowed through a mineral country, and that the formation was an andesite or diorite, both of which are gold bearing rocks.

Dr. Hudnutt testified on page 538, that there are 81 quartz claims within three miles from the recent survey of these placers, to the north, which, when considered with the testimony of Collier that the placers were the

old bed of the Nespelem and Columbia rivers, is strongly indicative of the good faith of the locators in believing that these claims possessed valuable mineral, which belief was strengthened by prospecting in the gravel underlying both these claims and finding gold.

V.

It is not believed that a further citation of authorities to support the contention of the defendant that the trial Court should be reversed, is necessary. The case of the United States v. Iron Silver Mining Company, *supra*, should be decisive, yet it might be well to consider the case of the Aspen Consolidated Mining Company v. Williams, 23 L. D. 34, as throwing some light upon the views of the Department of the Interior upon questions of this kind. That case presents a great many features similar to the case at bar, and after reviewing the testimony of the several witnesses on behalf of the plaintiff and defendant, the Honorable Secretary of the Interior Smith, said:

“In view thereof I am unable to escape the conviction that the land in controversy contains valuable mineral deposits such as the mining statutes declare to be ‘free and open to exploration and purchase.’ There can be no question that gold has been discovered on these claims, nor do I think there can be any reasonable doubt, upon the whole evidence, that it exists in sufficient quantities to justify men of ordinary prudence in the further expenditure of money and labor in their development (Castle v. Womble, 19 L. D. 445). Consider-

able money and labor were expended by the original owners, who appear to have been men of ordinary prudence, and much larger expenditures have been made by persons composing the Aspen company, who appear to be business men of character and standing. All parties admit that in placer mining the richest deposits are generally found at bed-dock; and in this case the heavy preponderance of the evidence points, in my judgment, irresistibly to the conclusion that the working and development of these claims will disclose valuable deposits of mineral, and that in this respect the locations are such as are entitled to the protection guaranteed by the mineral laws. True, no active mineral operations have been carried on by the company since its purchase, and much is attempted to be made of this fact. The record discloses, however, that nearly the entire claim is covered by conflicts, and that, so to speak, almost every foot of the ground has been or is being stubbornly contested. Under such circumstances it would seem impossible for the company to carry on active and expensive mining operations until the conflicts have been adjusted. Active mining operations are not essential in order to establish the mineral character of the land (*Johns v. Marsh*, 15 L. D. -96), and such a requirement under the circumstances of this case would be wholly unreasonable."

We submit that the Government has wholly failed to establish by a preponderance of or by any evidence, its allegations of fraud on the part of the defendant, appellant herein, and therefore the decision of the Court should be reversed and the action dismissed.

Respectfully submitted,

A. G. ELSTON,

Attorney for Appellant.

IN THE
United States Circuit Court of Appeals
 FOR THE
 NINTH CIRCUIT.

MULTNOMAH MINING, MILLING
 and DEVELOPMENT COMPANY,
 a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,
 Appellee.

UPON APPEAL FROM THE UNITED STATES
 DISTRICT COURT FOR THE EASTERN
 DISTRICT OF WASHINGTON,
 NORTHERN DIVISION.

BRIEF OF APPELLEE

STATEMENT OF CASE.

The lands which are the subject of this litigation are located in the vicinity of the confluence of the Nespelem and Columbia rivers on the south half of the Colville reservation in Okanogan county, Washington. The two claims lying together constitute one body of land adjacent to and under the waters of Nespelem falls. The Peabody placer location takes in both sides of the Nespelem river from a point above the lower falls of said river to where it empties

into the Columbia, about one mile southwest of the lower falls (Exhibit 4). Within six hundred feet from the east end of the Peabody claim, where the Nespelem river enters the boundary line of said claim, there is a fall of water in said river of approximately one hundred and seventy-five feet (Rec. 43). There is a volume of water flowing in this river estimated at three thousand miner's inches. These claims, as the record shows, are similar in nature to certain fruit lands situate in the same relative position as those lands to the river; where such lands are valued from one to four hundred dollars an acre.

The surface area of the Wickman placer claim is mostly level land, being described as a sandy loam soil on the surface (Rec. 53), the substantial part of which lies between seventy and ninety feet above the bed of the Columbia river. The western portion of the Peabody claim is similar to the land of the Wickman, mostly level, except along the banks of the Nespelem, where there are sand and gravel beds and where the land abruptly slopes toward the water of the river. All of the surface lands north of the Nespelem river upon both the Peabody and Wickman claims lie considerably below the dam situate at Nespelem falls on the Peabody claim, and the waters of said river, diverted at the falls, could be readily conveyed upon all the bench lands of both claims, while the power of the water falls of the Nespelem river is estimated at a capacity of approximately ten thousand horsepower, undeveloped (Complainant's Ex. 10, p. 13).

These lands on this river, including its falls, were located by the appellant company as placer gold mining claims upon the sworn evidence of the appellant's agents and representatives that the same were valuable as mining lands; that gold had been discovered thereon, and that said lands contained deposits of gold. Relying upon these representations and the good faith of the appellant, the government issued patents therefor. Appellee contends that these representations were false and fraudulent, and were known by appellant company to be false and fraudulent when made. Appellant in its answer (Paragraph 7, Rec. 30-31), after traversing the allegation of the complaint and admitting in substance that the representations were in fact made as therein alleged, contains this denial:

"Defendant denies that it knew of its own false and fraudulent acts described in the complaint. * * * Defendant alleges, moreover, that all of said acts and doings were done in good faith and in the belief that all of said things were true and without any knowledge of their falsity." (Rec. 31).

We think this extract from the defendant's answer presents the gist of the issue in this case. First, appellant relies upon the truth of whatever representations it made in procuring the lands; and, second, if it should develop that their statements and representations were false, it still hopes to escape the consequences of its acts by the alternative that it did not know of its own fraudulent acts. The issue squarely presented, then, is that of fraud—were the

claims initiated and perfected in fraud of the rights of the Government?

ARGUMENT.

TO ENTITLE ONE TO LOCATE LANDS AS PLACER GOLD MINING LANDS, THERE MUST HAVE BEEN DISCOVERED GOLD IN SUCH QUANTITIES AS WOULD JUSTIFY A PRUDENT PERSON IN EXPENDING LABOR AND CAPITAL IN WORKING AND DEVELOPING THE SAME FOR GOLD .

At the outset, we think we are justified in laying down the legal proposition that in order to entitle a citizen to locate lands of the United States as placer gold mining lands, mineral must be found there not only by "colors in the pan," but there must have been discovered gold in such quantities as would justify a prudent person in expending labor and capital in working and developing the same for gold.

As was said by Mr. Justice Brewer in the case of *Chrisman vs. Miller*, 197 U. S. 313, reading at page 323:

"There must be such a discovery of mineral as gives reasonable evidence of the fact either that there is a vein or lode carrying the precious mineral, or, if it be claimed as placer ground, that it is valuable for such mining. * * * There was not enough in what he claims to have seen to have justified a prudent person in the expenditure of money and labor in exploitation for petroleum. It merely suggested a possibility that the ground contained oil sufficient to make it 'chiefly valuable therefor.'"

See also:

Lindley on Mines, vol. 1, page 609;

Castle vs. Womble, 19 L. D. 455, 457.

It is the contention of the Government that it is overwhelmingly established by the evidence in this case that these so-called placer lands do not now, and did not at the time appellant, through its officers and agents, located and procured patents to the same, present such indications in mineral as would justify a prudent person expending labor and capital in their development for gold or in working the same as placer mines in any manner whatsoever, and there was no legal and bona fide discovery of gold thereon.

THOROUGH EXAMINATION AND CAREFUL PRACTICAL TESTS MADE BY APPELLEE'S WITNESSES SHOWS NO INDICATION THAT THE LANDS CONTAINED A DEPOSIT OF PLACER GOLD.

That the statements and representations were made by appellant, its officers and agents, to the effect that these lands contained gold deposits is not disputed, but on the contrary they still contend that it does now, as it did then, contain the gold deposits. We shall, therefore, at once proceed to call the attention of the Court to those matters of evidence contained in the record showing that those statements were false and that no gold deposits in paying quantities were in fact found upon these lands.

Testimony of F. M. Goodwin.

In the fall of 1906, F. M. Goodwin, acting as the agent of the General Land Office, at the instance of the Secretary of the Interior, in company with one Arthur J. Collier, visited the lands in question for the purpose of making an examination of same to ascertain whether or not these claims possessed value for placer mining purposes (Rec. 109). After carefully examining all surface indication, the topography of the land, the water of the river, measuring its flow and the height of the falls, Mr. Goodwin and associates proceeded to test this soil by panning the same for gold. They first examined Improvement one, discovery shaft, on the Peabody claim (Comp. Ex. 4). As the result of that careful examination Mr. Goodwin gave the following testimony:

A. This was a pit about six feet square at the top, and perhaps eight or ten feet deep, as I recall it.

Q. What did you do toward testing the ground for it, and so on?

A. Well, we cleared off the dirt that had fallen down so as to get a solid bank, to a solid bottom, and took samples of the dirt in gold pans and took them down to the Nespelem river and panned it.

Q. What was the result of the panning?

A. Neither Mr. Collier or myself found any colors in those sands. (Rec. 116).

Referring again to the same examination of this number one discovery shaft, he testified:

A. The hole extended—the hole at the top extended through a clay soil and according to my recollection it went down into gravel formation. This particular pit.

Q. That particular one?

A. Yes, sir.

They further proceeded to an examination of what is designated as Improvement 2, discovery shaft (Complainant's Exhibit 4) on the Peabody location, and the result of that examination is given in Mr. Goodwin's testimony as follows:

Q. State how you got the dirt that you panned from this shaft No. 2?

A. I would like to state in that connection that in all the panning that I did on this trip and on these claims, Mr. Collier and I took our dirt at the same time and mine was taken under his direction as well as my own judgment—in other words, we worked together in taking our samples, and we first cleaned out the loose dirt and all the loose stuff so as to get solid formation as near as we could.

Q. Virgin ground?

A. Virgin ground.

* * * * *

A. (Cont.) Then we would sample it. After we had taken our pans from the side of the pit we would sample it from the top down.

* * * * *

A. (Cont.) We would take it from the bottom, we would carefully take a small strip across the bottom. (Rec. 118).

It also appears from Mr. Goodwin's testimony that he made various pannings and samples from the formation along the Nespelem river, upon which, as the Court will see, the defendant lays so much stress as to the discoveries made in those formations, and as a result of that examination he testified (p. 119 of Record):

Q. When you say river, please state which?

A. Nespelem river. We also panned some dirt taken next to the clay deposit which crops out along the Nespelem river.

Q. Along the Peabody claim?

A. And which also crops out on the Columbia river to the west—west of the Wickman claim.

Q. With what result?

A. With no result in either case. We also then cleaned out a place in a little coulee or gully that runs down in a somewhat northerly and southerly direction across—a place, a gully or coulee, and we panned some dirt from that point. We got no colors in any point on the Peabody placer claim in all of our panning.

* * * * *

A. We examined three of the pits that we found there—one had been a very small one and may have been a wash out. The other examinations were confined to holes that we dug ourselves, or from the river. We panned at four different places on the river.

Q. When you say river, you mean the Nespelem river?

A. I mean the Nespelem river. (Rec. 120).

Witness Goodwin further testified to examinations made upon the Wickman placer claim at the same time, having in view the same purpose. Improvement one discovery shaft of the Wickman claim (Complainant's Exhibit 4) was in like manner carefully examined, and the result is given in Mr. Goodwin's testimony (Record 130), part of which is as follows:

Q. In what manner did you test the hole, if at all, for the purpose of seeing whether the ground carried gold?

A. Mr. Collier and I both took a pan of dirt from this cut, the same as we took it at other places

in the manner already described, and panned it in the Nespelem river.

Q. Did you take undisturbed soil?

A. Yes, sir, from the sides and bottom of the hill, as I recall it, or from the back end of the hole where we could get it solid, down to the bottom.

Q. You panned it, did you say?

A. Yes, sir.

Q. With what result as to finding gold?

A. In one pan we found two small colors. The other was a blank.

Q. That is pretty close to the Peabody placer line?

A. That is very close to the line running between corners 2 and 3 of the Peabody placer.

As to the examination of one of several pits dug upon the surface of the Wickman placer, Goodwin testified as follows:

A. It was seven feet by five feet in size and about fourteen feet deep—twelve to fourteen feet deep.

Q. What examination did you make of it for the purpose of testing it?

A. I could not state whether it was that particular pit or not. We found six different pits of approximately the same size on the Wickman placer and I could not tell which particular pit now we dug our dirt to pan—out of which particular pit.

Q. Did you take it from all.

A. We took it from three different pits.

Q. But you do not recall which pits those were?

A. I don't, except they were of those six.

Q. What did you find, gold?

A. We found no gold.

Q. You sampled them and panned them, the same as you did the others?

A. Yes, sir. (Record 131).

As a result of his general examination as to

the placer gold upon these claims, Mr. Goodwin stated that from his experience in testing placer lands for gold he found no indications that these lands were valuable for placer mining. From his entire examination, it appears that but two colors were found, and these were barely discernible with the naked eye, and that it was necessary to use a microscope to distinguish from the black sand.

Testimony of George W. Comerford.

The Government produced the witness George W. Comerford, he having had experience in testing grounds as to their value for placer mining purposes since 1896 (Record p. 157), whose knowledge of the methods used in determining the presence of gold in loose soil or placer grounds can not be questioned. In April, 1909, at the instance of the complainant, he visited these lands for the express purpose of ascertaining by practical tests and general examination whether or not the same carried gold or were valuable for placer mining purposes. As the best means of conveying to the Court the result of Mr. Comerford's examination, we take the liberty of quoting from his testimony appearing in the record.

Referring to the examination at Improvement 2, shaft on the Wickman, he testified: (Record p. 162).

A. It lay to the northwest of the end of the ditch, improvement 2 on the plat. The hole is in the coulee or gully, some clay, a little, very little gravel, that is sand, no gravel at all, but sand. I prospected the shaft for the nine feet by scraping down the sides after cleaning off the face, having a gold pan at the bottom and scraping into the pan

and mixing the dirt, sampled it, then taking out of each pan approximately two double handfuls of dirt. I sampled the shaft the entire nine feet that way.

* * * * *

A. Nine feet down, yes, sir. I had with me a post auger.

Q. A post hole auger?

A. Yes, sir, about 8-inch bore I think—that is right, an 8-inch bore, and I bored into the bottom of that shaft 6 feet and 8 inches and sampled that 6 feet and 8 inches as I went down. All the dirt I sacked and carried with me. Working east and a trifle to the north of that I sampled another shaft. That shaft was 9 feet and 6 inches deep, good walls and bored there 5 feet and 6 inches deep in the bottom of the shaft and sampled each and every other shaft similarly. A trifle eastward and south of the line shown as improvement No. 3 or ditch I found another shaft. That shaft was in a bad shape and caved in to a certain extent, and sampled, well as far down as the bottom, and dug down in the waste that had fallen in and put the auger below 7 feet in the bottom of the hole. Traveling still eastward and south of the line indicating the ditch I sampled another shaft. This shaft was in very bad condition. I sampled the walls of the shaft to the depth I could and I bored down close to the wall and right under the cribbing that was there.

Q. Do you remember how far you went down?

A. I remember the cribbing was nine feet and the auger hole was four feet below the cribbing. These notes were all made instantly at the time of doing the work. Working eastward a little yet—

MR. BLAIR: Now describe the cribbing,—describe what you mean by cribbing?

A. The cribbing is, with reference to this hole, boards that were put there to retain the walls and assist the walls, it is the timber that was put in. Working southwest from the point marked on ex-

hibit No. 4 as being corner No. 5 of the Wickman, and No. 2 of the Peabody, there is indication of a shaft having been sunk there, but it was caved in and impossible to prospect it. By the side of this shaft I sunk then an 8 inch auger hole to the depth of 8 feet and prospected and sampled each six or eight inches as I went down.

In close proximity was another hole that was caved in that I sunk an auger hole in to a depth of 8 feet and prospected it the same as the other. In the vicinity of improvement No. 1 of the Peabody I found 2 holes there side by side. They were 12 feet and 13 feet down. I prospected them to that depth.

Q. How did you prospect them?

A. From the walls, and from the—I didn't sink the auger hole very deep there as it went against the rock and I think I will stop there.

Q. Did you sink it to the rock?

A. Yes sir. Then in the vicinity of improvement No. 2 I found—

Q. On what claim?

A. On the Peabody. There is a shaft there that was badly caved in and impossible to get into, but the dirt thrown out of the shaft was on the rim of the shaft and I sampled the dump of the shaft and also at another point not far from there and a little south of that there is another shaft there that was caved in and I sampled the dump of that shaft.

Q. What did you do with the dirt or stuff that you took out of these placers. How did you test them and how did you sample them?

A. The dirt taken out of the shaft that time I sacked in two gunny sacks and loaded it on a couple of ponies that I had there and took it over to the camp there and took them down from the camp and I washed the dirt by panning at the Columbia river, saving the concentrates we found that might be in the dirt. The dirt taken from the vicinity of corners 3 and 5 of the Wickman and Peabody we took to the Nespelem river. That was also sacked and hauled over

there in a buggy and I panned that and washed it out in the Nespelem river.

Q. What did you find?

A. I found some,—very little, black sand, but nothing, no showing, no gold whatever visible to the naked eye from all the dirt taken from the Wickman placer and no gold visible to the naked eye taken from the Peabody placer with the exception of the dirt taken from the shaft nearest—from the bottom of the shaft nearest to the Nespelem river. There I saw one color, but it was so small that I can only describe it by saying that it was about as small as the smallest dot that you could make by touching your pencil point.

MR. BLAIR: No gold visible to the naked eye from the Wickman?

A. None whatever. That one color was the only gold that I saw taken in any of my prospecting over there on the claims.

Q. Did you use the best method and the best effort that your experience suggested to ascertain whether or not there was gold on those claims?

MR. BLAIR: I object to the question as immaterial, whether or not he did is a matter to be decided, but not in detail and not his conclusion as a witness.

A. I did, and I used extraordinary care in panning and sampling, the samples that were taken.

MR. BLAIR: I move to strike the answer.

Q. Now further test of the ground there, you say, did you make any concentrates?

A. I saved all the concentrates from my panning and put them into a jar I had, keeping the 3 samples, kept the samples separate and brought them all with me to Spokane.

Q. Did you number them?

A. I did, yes sir.

Q. How did you number them?

A. 1, 2 and 3.

Q. How much for instance of your original dirt was concentrated into samples No. 1, how many pounds?

A. About 180 pounds of dirt constituted sample No. 1 of concentrates,—was concentrated into one sample.

Q. How many pounds of original dirt did you concentrate into sample No. 2?

A. There is between 140 and 150 pounds of dirt concentrated into that sample.

Q. And how much dirt did you concentrate into sample No. 3?

A. From 65 to 70 pounds.

Q. What did you do with those samples which you say you numbered 1, 2 and 3?

A. I delivered them to Mr. Webster.

Q. M. F. Webster?

A. M. F. Webster, for the purpose of making an assay and ascertaining the value of the concentrates.

Q. He is connected with C. M. Fassett's assaying establishment in the city?

From this careful examination made by Mr. Comerford, the practical tests made of the ground, and from his general inspection of the lands, he gives it as his conclusion, based upon his knowledge and experience, that "there is no indication of any condition that would lead a person to believe that the lands contained a deposit of placer gold."

Mr. Comerford's examination shows that he carefully and laboriously took samples of this earth and loose material from as many as ten different shafts, at different depths, down the sides of the shaft and the bottom, and then by means of an auger bored still further into the bottom of these shafts, bringing up the material from *bed rock*, carefully sacking and

sampling the same and taking it to the river for panning. *These examinations, extending practically over the entire surface ground of these claims,* could furnish no more accurate or convincing evidence or tests to demonstrate the presence of gold in this soil if, in fact, gold was there to be found.

Not relying, however, upon the result of his own panning and examinations and his own opinion or eye sight, as the defendants have entirely seen fit to do, but in order to make assurance doubly sure, Mr. Comerford carefully saved the concentrates or sand resulting from his numerous pannings upon these alleged placer grounds. He brought these concentrates to a competent and responsible assaying concern in Spokane, to-wit: C. M. Fassett & Co., where the same were assayed and tested by one, M. F. Webster, an experienced chemist and assayer (Record p. 180). For the result of this examination and analysis of the concentrates aforesaid, we refer the Court to Mr. Webster's testimony contained at pages 181 and 182 of the record.

This material so tested, sampled, panned and analyzed by the best methods known, in an honest effort to ascertain the true mineral constituents of this soil, was all taken from and in fact represented the true character of every form of soil which could be found upon the entire body of land which *this defendant still has the temerity to contend contains valuable gold deposits which can be secured with profit.* But we are content to submit the good faith of this claim of defendant upon this unmistakable proof as shown

by the tests of these concentrates, *it being demonstrated that out of one ton of earth as assayed, the highest value found would be, .00147 of one dollar, and from this test we submit to the Court whether such values would justify a prudent person in expending labor and capital in the development of such lands for gold by any process whatever.*

Testimony of Arthur J. Collier.

The testimony of Arthur J. Collier, of Washington, D. C., a geologist and mining expert and who had been in the employ of the United States Government in these capacities since 1898, who accompanied F. M. Goodwin, the witness above referred to on the trip of inspection to these lands in August, 1906, was taken by deposition, which is filed in this case and has been published pursuant to stipulation between counsel.

We respectfully invite the Court's careful examination of this deposition in strong corroboration of Mr. Goodwin's testimony above set forth, and for the additional reason that Mr. Collier was especially qualified to make this investigation and his testimony shows a careful and conscientious effort to ascertain the true character of this land (Rec. 39). After giving in detail a description of the claims, the manner in which they proceeded with the examination of the properties, Mr. Collier testified, in his deposition (Rec. 45), as follows:

Q—22. Please state whether or not you examined the bed of the Nespelem river for gold?

A. We did.

Q—23. With what results?

A. We examined the bed of the Nespelem river and found no gold at all in the river bed. We took pans from the gravel and sand in the bed of the river, washed them, and found no gold. We took pans also from the low benches at the sides of the river and found no gold in them either.

His deposition showed that they then proceeded to examine the bench lands, taking samples from the discovery pits in several places and finding no gold in them; also at the edge of the benches and along the gullies which had been washed out by water, where they took samples from these gullies and panned them for gold, but finding none. In regard to this examination of the gullies he stated:

Q—25. You stated that the sides of these gullies would show gold if the land contained gold, please explain that?

A. If the land contained any gold these gullies should act as sluices in which some of the soil would wash down to the river. In washing down to the river the gold would be left behind in the beds of the gullies, while the light materials would be washed on into the river. (Rec. 46).

Based upon his experience and the examination of these lands, Mr. Collier did not hesitate to give it as his opinion that these lands were not valuable for mining purposes.

The examination of the Wickman claim, as disclosed by his deposition, substantiates and strengthens the testimony given by Mr. Goodwin, and the candid, fair and open manner in which Mr. Collier testified to finding gold colors at other places, twenty-five miles up to one hundred and fifty miles away from these

claims along the Columbia river, shows no effort on his part to exaggerate or in any way color the true conditions, as is shown by his answer to the following interrogatory (Rec. 100).

Q—19. In selecting spots for your examination on the Peabody and Wickman claims, by what were you governed?

* * * * *

A. We were governed in the first place by the prospect holes which the claimants had dug on the claims. One of these prospects holes was marked "discovery pit," and asserted that the discovery of gold had been made there. We, of course, necessarily panned in that hole and panned in other holes situated about similarly to it. We panned along the river and selected the gravel next to the bed rock in order to see if there was any possibility of there being gold there. We also panned in the sides of the creek to see if there was gold there, and also panned in the little gullies that ran down to the creek. We selected the pans always with a view to giving the claimants any benefit of any doubt that there might be as to the value of the claims.

Based upon his experience and the examination of these lands, Mr. Collier also did not hesitate to give it as his opinion that these lands were not valuable for mining purposes.

Testimony of Howland V. Stevenson.

Mr. Howland V. Stevenson, a man of over thirty years experience in mining, covering nearly all the states of the Union where mining operations are conducted and familiar with what is known as the Nespelem country in the state of Washington, made a most thorough examination not only of the pits on the lands but of the gravel and sand bars along the Nes-

pelem river. Much stress is laid by appellant upon the gold bearing properties of the gravel and sand bars along this river, and for this reason we invite the attention of the Court to his testimony (Record 771). His purpose in visiting these claims at the instance of the Government was to make an examination by practical tests to ascertain whether or not gold was there in paying quantities, and the results of his investigation may be gleaned from the following extracts from the record (Rec. 777):

Q. What other examination did you make to ascertain whether there was any gold in either of these placers?

A. I examined all of the pits or shafts that I found on these two placer claims, most of them had been caved. On two I found some gravel lying on dumps,—on two of them, here close to the river, a little ways back from the river, and I took several pans from off that gravel, on both of these pits and there was no gravel there in any of the pits.

MR. BLAIR: What?

A. No gravel there in any of the pits and only on the two pits did I discover any gravel lying on the surface, that looked as if it had been taken out of these pits. The other pits were all in very loose soil. In all of these pits I took pannings and in not a single one, nor in the gravel of the two pits that I just mentioned did I find any gold whatsoever.

Q. Do you know about how many pits there were in all that you refer to, if you can, give it about correct?

A. About ten.

Q. Ten what?

A. Ten pits.

Q. Did you make any surface examination of the claims?

A. I followed the river from where this dam was down the canyon and to its mouth.

Q. That is the Nespelem river?

A. The Nespelem river, for quite a distance, the river is in a rocky canyon and is very steep, quite a great fall there and when the river gets down to where it is flatter, I examined several bars, gravel bars, *on both sides of the river and the banks of the river on both sides*, and I took in the neighborhood of thirty pans of dirt along there, I think it was thirty-two, I would not be positive as to that amount, and I found in numbers—in numbers of those pans, I found a considerable black sand, more or less, and some garnets, but not in a single pan did I find a single trace of gold, that is placer gold, visible gold to the eye or to the glass.

Mr. Stevenson's testimony shows that he visited the lands prepared to make a thorough examination. He had proper pans, pick, shovel, sacks for sampling and collecting the material, and beginning his examination at the dam, as testified to by him, down both sides of the Nespelem river to the mouth and up upon the surface of both the Wickman and the Peabody claims, in all of the pits and excavations which had been made by the defendant, or its officers, and purporting to have been discovery shafts, and then carefully along both sides of the ditch designated as Improvement 3 Ditch, on Exhibit 4, as well as in the gullies and every place where, according to his statement, there was any indication that the gravel or soil contained mineral, resulting in an absolute failure on his part to discover any trace of gold.

Appellant in its brief has devoted considerable space in attempting to make it appear to the Court that the examinations made by the several witnesses for the Government had not been thorough or made

with an honest endeavor to ascertain the true condition of these lands. From the testimony of these witnesses it must appear to the Court that the examinations were most exhaustive and the kind which would be calculated to discover the gold bearing properties of these claims if any there were. The surface of the lands was examined, the pits and excavations known as the discovery holes were examined, the gravel and sand bars were examined, and all without results.

A CAREFUL EXAMINATION OF THE TESTIMONY OF APPELLANT'S WITNESSES WILL SHOW IN THE FINAL ANALYSIS THAT EVEN FROM SUCH TESTIMONY GOLD WAS NOT FOUND IN PAYING QUANTITIES.

While the witnesses on behalf of appellant testified to finding gold in a great many places yet it will appear even from their testimony that in the final analysis it is admitted that it is only by the hydraulic process of placer mining if at all that gold could be produced in paying quantities, and then only by enlarging upon the peculiar advantages offered by the use of this great and valuable water power upon the lands. In fact the examination of appellant's witnesses was devoted largely to an effort to establish that appellant intended to develop the lands in question by means of the hydraulic process of placer mining.

But it is palpably evident from the circumstances and testimony in this case that this proposed hydraulic method was never seriously within the defendant's contemplation and they did not intend to install such a

system. In this connection, as indicating the want of good faith of the defendant, we think it sufficient to call the Court's attention to the facts as shown by the record that none of the witnesses, who were vitally interested in this project, gave satisfactory evidence or explanations as to how their proposed plan or system of hydraulic was to be put into operation.

Seven witnesses were examined, each of whom claims to have seen gold in the pans of earth taken from these properties. Each one of these witnesses, the Court will find, is either directly interested in the appellant company, or has been in its employ. We know of nothing which prevented appellant, if its contention is true that gold values are so easily discernible upon these lands, from having secured competent, honest, disinterested mining men, or other persons, to go upon these lands who might have brought to the examiner on the hearing evidence not so palpably colored and weakened by the interest which is apparent of every witness the appellant has produced.

Testimony of G. S. Wickman.

Of this character, we refer to the testimony of G. S. Wickman (Rec. 183), who was the treasurer of this company, was named as a locator of each of the claims and also an incorporator of the company, and while he was a locator and incorporator, as aforesaid, at no time had he ever visited the claims until the year 1903, when in company with Dr. Hudnut, the general-manager, he witnessed the panning of soil or sand upon these claims for several hours. He had

never panned for gold prior to that time, yet claims that he found colors easily upon panning the sand. It appears from his testimony that in every instance where he claims to have seen valuable indications of gold in this soil, either Dr. Hudnut, Mr. White or Mr. Early, or those directly interested in holding these lands, were present and furnished him with the information upon which he based his opinion as to their value.

One White, it was claimed, who was taken to the lands after this suit was started, for the purpose of getting evidence, testifies to the discovery of a nugget during one of his pannings, and Mr. Wickman testifies that he saw the nugget in the pan, but the circumstances under which this remarkable discovery *was made must convince us that this was a foreign substance and not a common characteristic of the soil of these claims.* Regarding the manner in which Wickman observed this value, he testified (Rec. 202).

A. Mr. White called me and we went over and he had a nugget in his pan.

Upon another occasion Mr. Early finished a pan which Mr. Wickman was attempting to operate. Regarding this he testified (Rec. 222).

Q. Why did not you finish it?

A. Because Mr. Early made the remark, you have got a damn good pan there—you will spill it out—and took the pan away from me and finished it.

Some inference was attempted to be drawn from this examination that a valuable assay certificate had been procured as the result of his pannings, but the Court will search the record in vain for any evidence

to prove that the colors which Wickman testified as having gathered were of any value whatever, and the evidence upon which his opinion as to their value was based, evidently came from what the others told him, who were with him upon the ground.

Testimony of J. R. Giffellen.

The witness Giffellen gave testimony of gold discoveries at numerous places upon these claims. From a careful examination of his testimony, we conclude that his statements in this respect are not only highly improbable, but seem to us absolutely absurd. He had been in the employ of the defendant company "quartz mining" (Rec. 259) and had lived at Nespelem for about ten years. In the year 1898, he had been prospecting over the entire country tributary to the Nespelem and Columbia rivers in that vicinity. Everywhere, according to his testimony, he panned, gold was discovered as defined by him, both fine gold and coarse gold. With apparent ease he was able to obtain gold colors visible to the eye without the use of the glass, not only upon these lands, but along the strip of land to the southwest of the Wickman claim, which, it will be seen, for some reason, the defendant in locating, failed to include in its location. From 1898, when he was prospecting in this locality, until three weeks prior to giving his testimony, he had not panned for gold upon any of the lands involved in this suit. His testimony indicates that at the time of his prospecting, he was searching for ground suitable for sluice box placer mining. The apparent inconsistency

of his testimony will be seen by an examination of the record, where he testifies as to the result of his examination and the reasons given by him for not locating upon the lands. (Rec. 319).

Q. Now you were pretty well satisfied the first time you went up there in 1898, in July, I believe you said,—you said you were pretty well satisfied that that was a gold claim?

A. Yes, a good claim for hydraulicking.

Q. Hydraulicking it?

A. Yes sir.

Q. It was not a paying proposition to pan, was it?

A. No sir.

Q. And you were not looking for a hydraulicking proposition, were you?

A. No, sir, looking for sluice boxes.

Q. Sluice boxes?

A. Yes sir.

Q. That is by shoveling it into the sluice boxes and turning the water on and by putting the water on to flow through the sluice boxes?

A. We shoveled it into the boxes while the water is going through.

Q. Why couldn't you do it up there—why couldn't you work the sluice boxes up there? There is fair water and fair everything else?

A. Because it takes too many men.

Q. A sluice box proposition is perfectly feasible up there so far as the physical features are concerned,—that is you have the water and force and place for the boxes and dirt and all that sort of thing, but I understand you to say you could not make money out of sluice boxes?

A. No sir.

Q. That is right,

A. That is right.

Q. Make more money out of sluice boxes though than you could out of panning, couldn't you?

A. Yes—by rocking or using a long tom, same condition, sluice boxing, rocking, panning, and using a long tom.

Q. You could not mine up there profitably by a long tom or rocker or panning or sluice boxes, could you?

A. No, not to make any profit out of it.

Q. Now you said you thought it was a place a man would be—a reasonable man would spend his labor and time in developing it for the purpose of securing gold, didn't you?

A. For the purpose of hydraulicking.

Q. Well you had the time didn't you?

A. How is that?

Q. You had the time?

A. Yes we had the time.

Q. You had the labor?

A. Partly.

Q. What do you mean by that?

A. It is a slow operation for two men to go ahead and we didn't have the money to hire more.

Q. Did you make a very careful thorough examination when you went up there in July 1898?

A. We made a thorough reliable examination and we were satisfied ourselves.

Q. You were entirely satisfied of the character of the land?

A. Yes sir.

The witness also testified that the lands could only be profitably mined by hydraulicing and gave it as his reason for not using that method that he did not have the means. We especially call the Court's attention to the seemingly careless and superficial examination which this witness gave the lands compared to the laborious and painstaking method used by the witnesses for the complainant in its effort to ascertain the truth. This witness, with apparent ease and at a

depth of eighteen inches, was able with the naked eye to discern colors in every pan of earth or gravel with which he experimented, and yet, the record of his testimony will show the careless and indifferent manner in which he made this examination. At page 330 of the record, appears the following:

Q. How many holes did you say you dug there?

A. We dug a number. I don't know how many.

Q. Two or three?

A. More than that.

Q. How big holes were they?

A. They were little, just so we could get the gravel out.

Q. A foot or two feet or six feet or what?

A. Something about two feet.

It appears that shortly before giving his testimony when he expected to be called as a witness for the defendant, he made an examination of these lands, upon which he testified as follows:

Q. Then did you go into,—when you went up there three weeks ago, did you go into the holes or the discovery shafts or anything?

A. No sir.

Q. Didn't see any?

A. Yes I saw some there.

Q. Didn't go into any?

A. No. They had been caved in and filled in with dirt and it would be a whole lot of work to get down into gravel and find anything at that time we were there.

Q. How deep are those holes?

A. I didn't see.

Q. Didn't pay any attention to them.

A. No.

Yet this is the character of testimony upon which appellant relies to show that the surface lands, as well

as certain gravel beds along the water, contained valuable deposits of gold. It was this witness who testified, when asked to define the difference between fine and coarse gold (Rec. 322):

“Coarse gold is gold you can see with the eye, and some of it is so you can pick it up even and drop it in the pan and it will rattle, as big as No. 4 shot.”

It is significant that this witness, after all his valuable discoveries, abandoned the claim at a time when he could have taken it, without even placing a stake thereon. From the numerous discoveries of fine and coarse gold he claims to have made, and having had an opportunity three weeks before the hearing to give some tangible evidence of his discoveries, he was unable to produce any of the results sufficient to be dignified as an exhibit in this case.

Testimony of C. M. White.

Of the same character of evidence is that given by one C. M. White (Record 346). This witness had also been in the employ of the defendant company “quartz mining,” having never engaged in placer mining. For some reason this witness was procured by Hudnut, the general-manager and Wickman, the treasurer, to go to the claims shortly before the hearing for the purpose of panning for gold, yet he does not hesitate to give his opinion that these lands were valuable for hydraulic mining, but were not valuable for sluicing and panning.

In regard to the value of his opinion upon this subject, we quote from the record (page 371):

Q. Ever do any hydraulic mining?

A. No sir.

Q. What is that?

A. No sir.

Q. I understand you Mr. White that you don't know anything about the cost or anything about the practical working of hydraulicking so far as expense is concerned?

A. No sir.

Q. And you don't know how much dirt can be made to pay or how much there has got to be in a yard to pay or anything like that?

A. No, sir.

The witness White is the party who found the alleged nugget near the Hudnut cabin at the time the witness Wickman was present and claimed to have seen it. We fail to see from this witness' qualifications, as shown by his testimony, what induced Hudnut to call upon him to make an examination of these lands; but it appears that Hudnut and Wickman drove to the town of Nespelem where they procured Mr. White, and requested him to go to the Nespelem river and pan for gold. Arriving there he was furnished pick and shovel, which were found in the Hudnut cabin and was requested to prospect for gold. The record shows that Hudnut and Wickman were present, saw him do the digging, were close at hand while the panning operation was being performed. The result of that panning was phenomenal, as it appears that the nugget was discovered soon after his work began. This alleged discovery, the evidence shows, was made at a place elevated about fifty to seventy feet distant from the river and about fifteen feet above the water and was found within eighteen

inches from the surface. The place where this nugget was discovered seems to contradict the statements of other witnesses, claiming that gold is found in the gravel at bed rock, while this substance seems to have been found near the surface.

Counsel on re-direct, asked witness White whether or not Hudnut or Wickman, being close at hand, threw this nugget into the pan (Record 376), which was, of course, denied. But from the manner in which this discovery was made, the circumstances surrounding the employing of White, the furnishing of the tools, the proximity of this discovery to the Hudnut cabin and the fact that nearly all of these colors of an unusual nature which it is claimed were discovered, were found in that same vicinity, we think the Court will readily see there were methods more ingenious and of a shrewder nature by which these nuggets could have been rendered accessible when needed.

Testimony of Thomas B. Early.

Thomas B. Early, superintendent of the defendant company, (Rec. 381), and resident of the town of Nespelem, who was one of the locators of each of the claims involved, as well as an incorporator of the company, and who staked the claims which were afterwards patented to the defendant, gave testimony as to gold discoveries having been made by him. After the Government began its investigation into the validity of these patents, in the summer of 1908, this witness superintended sluice box operations upon the claims for a month and a half without any results whatever

in value so far as the record shows. According to his testimony, the most flattering results of this box work in 1908 are described by him at page 503, of the Record, which we quote:

Q. Where did you yet the dirt from?

A. Along the Nespelem creek.

Q. Along the bank of the river?

A. Yes sir.

Q. Do you know how many colors were found in the black sand?

A. Well there was one little run that time that we counted 27 colors.

Q. You saved them did you?

A. Some of them we did, yes sir, that is, I saved them in a bottle, put them in a bottle.

Q. What is that?

A. Saved them and put them in a bottle, the black sand.

Q. You haven't got them now with you.,

A. No sir, not here, I gave them to the Dr. the manager of the company.

Thus he disposed of the entire fruits of the work of a month and a half in sluicing and these twenty-seven colors, alleged to have been turned over to Doctor Hudnut, general manager, have not been produced and no reference has been made to them as an exhibit, and no attempt is made by Doctor Hudnut to corroborate this statement, and we are forced to conclude respecting this witness' testimony the same as the others already referred to, that his statements as to gold discoveries are unwarrantedly enthusiastic and grossly exaggerated; for it seems that without much effort he also was able to find eight and nine colors in nearly every pan which he defined as "fine specks of gold, particles, heavy gold" (Record p. 433) "gold

that will rattle in the pan." And as a reason for not saving any of them he testified as follows:

Q. Did you save any of these colors that you have been describing?

A. Yes I saved some of them, a great many of them.

Q. What is that?

A. Saved some of them.

Q. I suppose ordinarily they were not saved were they?

A. Well I don't know whether the Dr. has some of them now or not.

Q. I am talking about your panning?

A. Well that is what I panned, my own panning, —that is you mean the last panning?

Q. No I don't mean the last panning.

A. No, not the first panning.

Q. I mean they were not saved prior to the commencement of this suit, I will say?

A. Well yes, once in a while we saved them.

Q. I hardly think that will answer my question.

A. Well we saved some of the larger.

Q. What is that?

A. I saved some of the larger particles.

Q. But ordinarily they were not saved, were they, generally?

A. Well generally—

MR. BLAIR: I object to the question as having been answered.

Q. Is that right?

A. Well when we would wash a pan of dirt and count our colors we would throw it back in the creek. It is true we didn't intend to save them, we would look at it and count it.

It appears that this witness was the original locator who staked the claims, and it was attempted to be shown that originally the claims took in the bank and

sand bars along the Columbia river, to the southwest of the Wickman location (see complainant's Exhibit 4). This location was afterwards amended so that the bank and bars along the water of the river were excluded from the location. Early, being superintendent, locator and part owner, was interested and ought to have known why this strip was excluded, but he professes repeatedly in his testimony not to know and to have no knowledge why the engineer, in the amended location, excluded that strip. He testified that he had prospected along the banks and gravel of the excluded strip aforesaid, and had found coarse particles of gold; that it was along there that the value showed the strongest, and it would seem that if the present contention is made in good faith that they proposed to work these lands by an hydraulic process, this portion of the ground which they excluded would have been more valuable and could have been worked with less expense than higher up, which they retained in the location. We think it highly improbable that this witness did not know, or that he had forgotten, the reasons entertained by these men for excluding the lands along the water and retaining the bench lands above.

Testimony of Dr. F. O. Hudnut.

The testimony of Doctor F. O. Hudnut requires (Rec. 515), perhaps, more consideration than that of any witness defendant has produced. He was the dominating force in this enterprise from its inception. He was the general-manager of the defendant company; was a locator of each of the claims and an incor-

porator of the company; he acted as the defendant company's representative in preparing proofs and filing applications for patent of these lands. He was called as a witness by the defendant and many pages of the record are devoted to detailing his wide and varied experience as a miner and prospector from the year 1884 until 1900, when he arrived in the Nespelem country with T. B. Early, his associate. After detailing generally his experience in finding particles of gold as the result of his pannings upon these claims, and in a most general way as to his belief in their value, he was asked by counsel for appellant to give the reasons prompting him to the belief that these lands were valuable for placer mining. Counsel made no effort to have this important witness detail the methods or care used by him in determining the value of his alleged gold discoveries, and it seems astonishing that this witness showed no disposition to be specific or fair in his testimony in chief, but upon the most general statements his conclusion was drawn that the lands were valuable and upon his production of certain alleged placer gold, contained in defendant's Exhibit "F," which this witness positively stated was placer gold taken from the Peabody claim, he was turned over for cross-examination. Regarding this Exhibit "F," he testified as follows (Record p. 550):

Q. Doctor I call your attention to this bottle containing what seems to be a black substance and ask you what there is contained therein?

A. Well it is black sand that was taken out of the Peabody placer, with gold in it.

MR. BLAIR: I ask to have this marked defendant's Exhibit "F."

Exhibit was so marked.

Q. Was that gold found upon the Peabody?

A. Yes, sir.

MR. BLAIR: I offer in evidence defendant's Exhibit "F."

MR. AVERY: I object to it on the ground that it is incompetent and that there is yet no foundation for admitting it in this case as evidence to prove or disprove any of the issues in this case.

MR. BLAIR: That is all.

Referring to exhibits, we call the Court's attention here that this witness was excused without any production of the bottle alleged to have been handed him by Mr. Early, containing twenty-seven colors. He was excused without attempting to corroborate the testimony of White, whom he had procured to prospect and who found the alleged nugget. These matters peculiarly within his knowledge, counsel did not venture to touch upon, and if the testimony of this witness had been concluded at that point, it would have resulted in an absolute fraud upon the Court, as will be seen by the following testimony given by this same witness on cross-examination, regarding this Exhibit "F," positively indentified by him as gold found upon the Peabody placer (Record 622):

Q. Doctor, calling your attention to defendant's "F," which is a bottle containing some sand, and I assume colors—where did you find these?

A. On the Peabody placer.

Q. You did find it, did you?

A. Yes, sir.

Q. Personally?

A. Yes, sir.

Q. When did you get them?

A. I should judge about 4 to 6 weeks ago, maybe
 7. I could not state.

Q. Who was with you at the time?

A. Mr. Armstrong and Mr. Gay.

Q. Who is Mr. Gay.

A. A man who was prospecting there on the
 placers.

Q. Did you get them all yourself or did Mr.
 Gay and Mr. Armstrong get some of them?

A. Mr. Gay and Mr. Armstrong got some of
 them.

Q. How long has Mr. Gay been prospecting
 there?

A. Mr. Gay?

Q. Yes, sir.

A. He has been working on the placer proposi-
 tion for two months and a half.

Q. Working for the company?

A. Yes, sir.

Q. Prospecting it?

A. Yes, sir.

Q. You were not with him all the time, were
 you?

A. I was not.

Q. He got some of those in your absence?

A. He did.

Q. Then when you say that you got all of
 them personally, that is not exactly true?

A. I mean that I got it from others, not that
 I panned there personally.

Q. You mean you personally took some of this
 stuff from Mr. Gay?

A. I personally took some of it from him and
 personally panned some of it.

Q. And Mr. Gay gave you some of it?

A. He gave me some of it, yes, sir.

Q. This is the result of Mr. Gay's panning for
 several months?

A. No, sir.

Q. How do you know?

A. Well because from the fact that that was

the result of—I don't know, perhaps 2 or 3 days or such a matter.

Q. I mean that about Mr. Gay?

A. Yes, I know.

Q. How do you know when Mr. Gay got it?

A. Well he stated about the time he got it.

Q. You instructed Mr. Gay to go up there and pan, didn't you?

A. I told Mr. Gay to go down there and prospect all over, prospect the Wickman and Peabody placers.

Q. But you don't know of your own knowledge whether Mr. Gay got that on the Peabody or Wickman or where he got it do you?

A. He worked on the Wickman and Peabody placers and then I had him prospect some ground that was entirely off the placers to see how it prospected.

Q. I just want to get down to the proposition that you don't know anything about where Mr. Gay got this?

A. I have to take his word for it.

Q. Mr. Gay is not here, is he?

A. No, sir.

Q. Is he still up in Nespelem?

A. I think he is in Nespelem. I don't know. I didn't bring that as indicating anything except a sample of the character of the gold.

Obviously, this particular exhibit must be excluded from consideration as utterly incompetent evidence and inadmissible for any purpose. It was put in on direct, however, without explanation or qualification, this witness at first, even upon cross-examination, adhering to his statement that he personally found it on the Peabody claim. This must illustrate to our minds the extremes to which defendant has been driven in scraping together a few gold colors as evidence, while at the same time they would have

us believe that gold is easily to be found upon these placer claims.

Upon cross-examination, this witness, Hudnut, evidenced a disposition to be unfair in avoiding and refusing openly and without reserve to answer the simplest questions concerning his inspection of these lands upon his first trips there in 1900, 1901, prior to their location, although professing to have been prospecting for quartz and placer mines at that time, being over these lands, made no effort, until 1901, to prospect the same for placer gold. In the latter year, in company with Early, he claims to have first prospected them, but his recollection is vague and uncertain as to the result of his investigation at that time, the very time when he was locating upon the Government's domain and taking up valuable lands as placer claims. Regarding his demeanor in this respect, we refer to the following (Record 568):

Q. You weren't there again in 1900, were you?

A. I don't have any recollection of it.

Q. When were you next there?

A. In 1901.

Q. What time of year?

A. I cannot state what time of the year I was there, excepting I was there soon after the location was made in June, one time. I don't think I was there at any other time. I would not say positively that I was there before that.

Q. You do not recall whether you were but that one time or not?

A. I could not state positively.

Q. How long were you there at that time—what part of the day?

A. Well long enough to look over the ground in June—look over the ground.

Q. Does that mean a day or more or less?

A. Well practically, taking into consideration the distance that it takes to go from one place to another, back to our camp. It is a hard two or three hours trip to get up there.

Q. Who was with you then?

A. Mr. Early.

Q. Did you pan any on that time?

A. Panned at the mouth of the Nespelem as I remember it.

Q. Whereabouts at the mouth?

A. Both sides I think. I am not positive, but I think both sides.

Q. That was on the Peabody?

A. That was on the Peabody, yes, sir.

Q. Did you get any gold at that time?

A. Yes, sir.

Q. Colors that you call gold; particles of gold?

A. Particles of gold, yes, sir.

Q. Do you remember how many you got?

A. I could not say, no, sir.

Q. They were small particles were they not—the smallest particles?

A. I could not state in regard to them.

Q. You don't remember anything?

A. I could not state. I know we got gold there. That is all I can state. I could not state the size of the particles of gold as regards to that matter.

Again in 1902, the witness Hudnut claims to have panned for gold upon these lands and his recollections as to the results that year are equally as unsatisfactory and inaccurate (Record 571). Every year since their location as placer claims he stated that he had panned there to "corroborate" his opinion as to their value (Record p. 452). Yet as a result of all his tests and investigations he failed to give explicit, definite information as to where he had panned or what the

results of his efforts were in values, and in none of his annual investigations had he taken the trouble to go into any of the discovery shafts upon the property, back from the river (Record 582), the very place where the discovery would be made, if at all.

The testimony of this witness, as all the witnesses on behalf of appellant, while claiming to have discovered gold on these claims, shows the same lack of results. Like the others, he made no examination of the discovery shafts, the very place, as the term indicates, where the gold must have been discovered if at all, but limited his search to the bed of the river. There is a total lack of recollection of what he found except that he says he found gold there.

Testimony of Joseph Kroll.

The testimony of Joseph Kroll (Rec. 819) we shall not discuss in detail; it is of the same general character as the others. This witness, having worked for the company, was requested by Hudnut to pan upon these claims for gold. He produced Exhibit "U" as the result of his entire work, which he testified was pannings gathered from both the Nespelem and Columbia rivers. It seems that he confined his operations entirely along the Nespelem river and did not go upon the surface of the claims, which he termed "among the grass roots," saying that he did not think any gold could be found on the surface; he did not pan along the ditch upon the Wickman, saying that "it would not be any use." He further testified that this Exhibit "U," which he claims contains thirty to fifty colors, part of which was gathered

along the Columbia river and part along the Nespelem river, was worth about one-half a cent, and did not know what part of it came from the Columbia river.

APPELLANT'S WITNESSES SHOW INCONSISTENCIES AND A TOTAL LACK OF DEFINITE RESULT.

A review of the testimony of appellant's witnesses shows that they were biased, unfair, evasive and inconsistent. To sustain their contention it was necessary for them to resort to a theory which in itself shows that the lands are chiefly valuable for the water that it contains. Conscious of the weakness of their own position relative to the amount of gold contained in the soil, while testifying to numerous discoveries of gold, all of the witnesses make it plain that they deemed it necessary to have recourse to a most highly perfected system of hydraulic placer mining if gold was to be produced at all in paying quantities. Evidently relying upon the proposition of law that if gold can be produced at a profit, the law is satisfied, irrespective of whatever incidental advantages it may offer, they have laid great stress upon the proposition that with the advantages offered by this great water falls it is possible to produce gold in paying quantities, where none could be profitably secured without this incidental advantage. In other words, they impliedly admit that ordinarily, with the small amount of gold claimed even by them to have been discovered, mining operations could not be successfully carried on, but they say in substance that

by evolving a gigantic and perfect system of hydraulic placer mining, by the aid of the advantages peculiar to these claims, it is possible to conceive the scheme to be feasible.

We believe the rule to be that the Court must first find that there was gold in paying quantity in these claims before the method of development can be taken into consideration; but, however that may be, it must appear plain to the Court that even that system of development was considered by appellant to be impracticable. Counsel for appellant, in attempting to explain the damaging circumstance that there had been a total omission to develop the claims after patent, at page 74 of his brief, says:

“As reflecting upon the omission of the defendants to do more than they had done towards equipping the property with a hydraulicking outfit, the testimony given by the witness (Rec. 737) in connection with the testimony of Wickman, discussed heretofore, frees the defendants from any suspicion. He shows under a searching cross-examination (Rec. 735) that the cost of such equipment as was considered installing was very large, etc,”

and then proceeds to detail the enormous expense which would be required to install the hydraulicking system, which, it is admitted, is the only method, if at all, by which gold could be mined. This, when taken into consideration with the testimony on behalf of the Government that a careful examination had been made and no gold found and that the claims are valuable for other purposes, and the further fact that as a result of upward of eight years of so-called mining operations only a few fine particles of gold

in two or three small phials containing water and black sand has been produced, must make it appear plain that appellant never intended to operate the claims as a placer mine, and that if the gold was anything at all it was the "incident," and not the water an incident to the gold mine.

OTHER CIRCUMSTANCES.

There are other circumstances in this case which appear clearly from the evidence, but which we do not deem necessary to discuss in detail. We refer—

1. To the change in the articles of incorporation. In September, 1902, the company executed amended articles of incorporation, giving the company power, among other things, to acquire lands for townsite purposes and right-of-way for ditches, canals, water courses and reservoirs; to contract for and maintain electric franchises, maintain and operate sawmills, etc. If the company in good faith intended to develop these properties as placer mines, why the necessity of amending these articles to include those things for which it is conceded the property is valuable.

2. Defendant ceased all operations or work immediately upon receiving its patents. The record shows that ditches were incomplete, shafts abandoned, the only work being upon the flume and power house.

3. The fact that appellant devoted its entire energies and capital to the working of its quartz properties located in that vicinity.

4. It appears that all of the efforts exerted by the defendant to hold these claims have been instituted

since this litigation was begun, and no gold which could be dignified by the name of evidence, no assays, engineer's reports or disinterested proof of these lands being valuable as placer claims, have been produced.

7. The insignificance of the exhibits introduced by the defendant as placer gold taken from these claims, when compared with the magnitude of its proposed operations and the great values of gold alleged to be in this soil, is apparent.

8. The repeated refusal and failure of appellant's witnesses to produce its prospectus and printed literature, from which is shown very plainly the intent and purpose with which these lands were obtained.

9. The indisputable fact that the lands in question are more valuable for irrigation and water power than for any other purpose.

10. The fact that these claims were located in 1901 and 1902, and rushed to patent in 1904, when work ceased thereon, while they continued to do their assessment work on their quartz claims, in the same vicinity, which were not patented; all of which, when taken in connection with other circumstances, tends to show that appellant was not acting in good faith.

PRINTED LITERATURE CIRCULATED BY THE COMPANY IN EXPLOITING AND ADVERTISING THE PROPERTY SHOWS REAL INTENT AND PURPOSE FOR WHICH THE PROPERTY WAS ACQUIRED.

But if it were necessary to have further evidence of the real intent and purpose for which the lands

were obtained, the literature printed and circulated by the company would supply that want. On the first day of the hearing before the master counsel for complainant requested the production of the prospectus issued by the company. It was then announced that anything of that nature in their possession would be produced. No effort was made by appellant or its witness to comply with this request to produce the literature, although the request was often repeated and ample time and opportunity given appellant to comply therewith, had they so desired. The real motive in withholding this printed literature will be readily observed by the Court by referring to complainant's Exhibit No. 10, which, by the industry of the Government's counsel, was secured and placed in evidence. We quote briefly from Exhibit No. 10, but respectfully refer the Court to the contents of the entire exhibit for a more complete exposition of the company's enterprise.

LAND IRRIGATION AND WATER.

The method of intensified farming and horticulture as now carried on in the West are so little comprehended, so new, and results so marvelous that many people do not comprehend, or if told do not believe the actual facts regarding the profits attached to it. Lands above and below Wenatchee, which six to eight years ago sold at from \$8 to \$100 per acre, are today held at from \$500 to \$3,000 per acre. This would be unbelievable were it not for the fact that at these phenomenal prices, they pay interest at from 10 to 30 per cent, nor is it alone here, but all along the basin of the Columbia the peculiar conditions of soil and climate create the most favorable conditions known for the production of all kinds of fruit in addition to garden products; these conditions

permit the most intense crops and the highest product per acre known; the profits are without precedent; as an example, Mr. E. L. Stewart on the Columbia sold last year from six acres \$6228.90 worth of apples, giving him a net profit of \$4,313.75, or 10 per cent on \$7,100.00 per acre. Lands have advanced during the last four years southwest of us, and east of us, from \$100 to \$200 per acre each year. Mr. D. C. Henny, supervising engineer of the United States Reclamation Service, says: "TWO DAYS' MINIMUM flow of the Columbia river produced more water than the ANNUAL run off of all the streams in the famous section of California in which lie Los Angeles, Santa Barbara and San Bernardino." He further says, speaking of irrigation on the benches and low lands adjacent to the Columbia, "It can hardly be doubted that in the future a large part of the flow of the river will be lifted to adjoining lands by pumps operated by WATER POWER which can be obtained from the side streams," etc.

This statement comes from the highest authority on irrigation, its methods and feasibility, in the United States. Any company so situated as to be able to irrigate land on the Columbia basin by water power or otherwise, have an immense fortune in their grasp, absolutely certain, and safe. (pp. 6, 7, Complainant's Exhibit 10.)

Twenty-three years ago the writer, bound for the new Coeur d'Alene mines, camped in the pines below where the Monroe street bridge now spans the Spokane river; the spray drifted into his face as he looked at that swirling, foaming mass of green and white translucent splendor, worthless to mankind then as a flint arrow-head. "Spokane Falls," it was then a straggling village of 2,500 people; today Spokane, the Inland city of the Northwest, its population 90,000, bank clearances for 1907 over \$300,000,000. The falls are harnessed; 16,000 H. P. operates all machinery and lights the city, operates 95 miles of city street car line, and 280 miles of electric lines. Power is transmitted to the Coeur d'Alene mines 100

miles away via line through Coeur d'Alene Indian reserve, and runs the drills, compressors, tramways, hoists the ores and conveys it to the concentrators, whereby \$23,000,000 worth of metals are added yearly to the world's supply. Should you ask any citizen there what made such prodigious growth and wealth possible in such a brief period, he will point to the blue mountains in the distance and say, "There are our treasure vaults with untold millions, HERE IS POWER. Around us the grain fields, averaging 30 bushels of wheat in 1907 per acre, and the irrigated fruit lands with the world's market reaching for them, pine and lumber at hand and above us the sunshine of perfect days." There is nothing here but sane, sober truth. It is the MINERAL, THE TIMBER, THE SOIL, THE IRRIGATED LANDS, and THE WATER POWER that makes Spokane. The same conditions elsewhere will produce like results, modified only by the extent and richness of territory that is tributary. The Northwest, then, with its unparalleled advantages of climate, timber, water, new and undeveloped land, presented the most promising field for securing the best paying properties. The next thing was to secure a strategic point from which, as a central pivot, the most of these would be adjacent and tributary. We found it, as I said, in the south half of the Colville reserve, open at that time only to mineral entry, but on March 22, 1906, the bill was approved opening it to settlement. The surveys and allotments are nearly completed, and upon appraisement of the land about 1,400,000 acres will be open for settlement. Take the map and look at our position geographically at the mouth of the Nespelem river. What does position count for? Everything!

* * * * *

Again we say position is everything. What operates to produce results in large things will, in a lesser degree, in small things; so with our company, whose history we have traced from its beginning, we have acquired and own the gold placers and bench

lands on the Columbia, and up the Nespelem valley above the falls, together with boat landing and mill sites, nearly all of which is patented. We have acquired the great WATER POWER of the Nespelem river, constructed a dam across it above the falls with head gate, flume, etc., and are now blasting from the solid rock space for a flume so large that we can, if desired, turn the entire river into our power plant, getting a fall of 157 feet of the entire river in 600 feet of distance. (pp. 10, 11, Complainant's Exhibit No. 10).

With the opening of the reserve and the installation of a power plant an impetus will be given this camp that will start the drills on scores of properties. Even now three companies are calling for power, for electric drills, for hoists and compressors. We cannot furnish it, but we are straining every nerve to be able to do so in the near future.

The Court will no doubt profitably examine in this connection Complainant's Exhibits 11 and 12, being of the same character of literature issued at the instance of the defendant company. It will be observed that no reference is found in this literature to the gigantic placer operations proposed by defendant's witnesses; no stress is laid upon the value of their alleged placer claims. The only value seemingly worthy of any emphasis being the location of their properties with reference to the water power and the availability of this water power for irrigation and power purposes. This evidence, coming as it does from the appellant company at a time when it felt at liberty to tell the truth, must appear to be the most satisfactory evidence of the real motive, the real intent, the real purpose in procuring these lands.

FRAUD FULLY ESTABLISHED.

Lurton, J., in the case of Mudsill Mining Company vs. Watrous, 61 Fed., reading page 171, says:

"Fraud, it is said, must be proven, and not presumed; yet fraud, like all other questions of fact, may be, and in most cases is, made out by circumstances from which the main fact is inferred. No witness has been introduced who testifies that he saw this metallic silver intruded into these bags of samples; yet circumstances so strong in their nature may be produced as to satisfy the mind and conscience that the guilty man is pointed out."

Viewed in the light of the law on the question of fraud, there is an air of improbability surrounding the whole of appellant's case, from which the thinking mind must conclude that the testimony of appellant's witnesses, judged by those standards by which courts weigh and consider evidence, is tainted, colored and artfully concocted, if not absolutely corrupt. And it seems to us that this inference of fraud in this case will arise, not alone from the fact that the lands in question did not bear gold and appellant knew it, but from the fact that they still strenuously maintain that gold is there.

CONCLUSION.

In conclusion will say that the following, among other things, clearly appears from the records:

1. That four witnesses testified on behalf of the Government, all of whom had made a thorough examination of the property, examining the discovery shafts by removing the loose dirt that had caved in

and getting samples from the sides and bottom, examined the sand and gravel bars of both the Nespelem and Columbia rivers, as well as the soil of the surface of the claims, all without results.

2. That the witnesses for appellant, all of whom are vitally interested in the claims, while testifying to finding gold in many places, always in the last analysis show conclusively that the gold discovered, if any, was not in paying quantities; all make it plain that the only method considered by them at all feasible was the hydraulic process of placer mining, and to render that feasible, according to their own theory, it was necessary to dwell so largely upon the great value of the water that it appeared even from their own theory that they considered the water of great value.

3. The printed literature of appellant company was intended to and did tell the real purpose for which these lands were obtained; the statements in which are true not only because appellant said so at a time when it felt disposed to tell the truth, but because it is borne out by every circumstance in this case.

In its opinion (Rec. 865) the lower Court says:

"It is a significant fact, however, that although more than eight years have elapsed between the date of the original location of the Peabody claim and the date of the last hearing before the Master, the net result of all mining operations on the two claims is a few fine particles of gold in two or three small phials containing water and black sand. The claims extend for more than a mile on either side of the Nespelem river from its confluence with the Columbia to a point above the falls; in crossing them the river falls

upwards of one hundred and fifty feet, and the claims are valuable for both power and agricultural purposes.

"After considering fully the location and character of the claims, the haste with which they were passed to patent, their almost entire abandonment since that time, and all the facts and surrounding circumstances, I am fully convinced that the claims were initiated and perfected in fraud of the rights of the complainant, and equity and good conscience demand that patents so obtained should be set aside and annulled."

We submit that the opinion of the Court as above expressed is fully sustained by the record in this case and the judgment should be affirmed.

Respectfully submitted,

OSCAR CAIN,

United States Attorney,

EDMUND J. FARLEY,

Assistant United States Attorney.

No. 2283

IN THE
United States Circuit Court of Appeals
NINTH CIRCUIT

MARY E. CRONEN,

Appellant,

vs.

WALTER BAKER MOORE,

Appellee.

Upon Appeal from the United States District
Court For the District of Oregon.

TRANSCRIPT OF RECORD.

CEIVED

FILED

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JUL 26 1913

W. MONGKTON,
CLERK

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MARY E. CRONEN,

Appellant,

vs.

WALTER BAKER MOORE,

Appellee.

**Names and Addresses of Attorneys
upon this Appeal:**

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Yeon Bldg., Portland, Ore.

For the Appellee:

A. E. Clark,

Yeon Bldg., Portland, Ore.

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*In the District Court of the United States, for the
District of Oregon.*

Be it Remembered, That on the 17 day of July, 1912,
there was duly filed in the District Court of the
United States for the District of Oregon, a Bill of
Complaint in words and figures as follows, to
wit:

[Bill of Complaint.]

*In the District Court of the United States for the
District of Oregon.*

WALTER BAKER MOORE,

Complainant,

vs.

MARY E. CRONEN, and THE SECURITY SAV-
INGS & TRUST COMPANY, a corporation,
Defendants.

In Equity

To the Honorable Judges of the United States Dis-
trict Court for the District of Oregon:

Walter Baker Moore, a citizen of the United States
and a citizen and resident and inhabitant of the State
of Washington, brings this, his bill of complaint
against Mary E. Cronen, a citizen, resident and in-
habitant of the State of Oregon, and the Security Sav-
ings & Trust Company, a corporation organized and
existing under and by virtue of the laws of the State
of Oregon, and doing business in Portland, Oregon,
and a citizen and resident of Oregon. Thereupon
your orator complains and says:

I.

That heretofore and in May, 1911, the above named defendant, Mary E. Cronen, brought an action at law in the Circuit Court of the State of Oregon for the County of Multnomah, against your complainant, Walter Baker Moore. That said action was duly and properly removed from said state court to this court where it is now pending and at issue. That said action at law, among other things, brought for the recovery by the said Mary E. Cronen against your complainant of the sum of \$100,000.00 and the costs and disbursements of the action. That attached hereto and marked Exhibits "A" and "B" and hereby made a part of this bill as fully as if herein copied at length, are true copies of the complaint and of the answer in said action at law brought by the said Mary E. Cronen against your complainant as above stated. That there is now on file with the clerk of this court and as a part of the files and records of this court in the said action at law, a certified copy of said complaint, which certified copy your orator now tenders for the inspection of the court. That the original answer in said action at law is now on file and of record in the office of the clerk of this court and said original answer is now tendered as a part of this bill and for the inspection of the court. Your orator further shows that said complaint and said answer were duly verified and duly served and proof of service made, but that the said verifications, certifications and proof of service are omitted for the sake of brevity.

II.

And your orator shows that thereafter and on or about the 24th day of February, 1912, a full and complete settlement and adjustment of all matters and things in said action at law was arrived at and agreed upon and reduced to writing and thereupon and in said action at law, a stipulation in writing was entered into between the plaintiff and the defendant in said action at law through their respective attorneys, the said stipulation being signed by John F. Logan and John H. Stevenson, then, and theretofore the attorneys of record of the plaintiff in the said action at law, and being then and there duly authorized and empowered by their client to sign said stipulation, and the same was signed in behalf of the defendant by A. E. Clark his attorney of record, being then and there duly authorized so to do. That a true copy of said stipulation is hereto attached and marked Exhibit "C" and hereby made a part of this bill as fully as if herein copied at length. That your orator is unable to produce for the inspection of the court at this time the original stipulation for the reason that the same when signed was deposited in the custody of the defendant Security Savings & Trust Company, and that said defendant neglects and declines to surrender the same into the custody of your orator, or into the custody of this court, unless ordered by this court so to do. And your orator is unable to produce at this time a certified copy of said stipulation in connection with the bill and for the inspection of the court for the reason that said stipulation is not on

file or on record in the office of any public officer authorized by law to certify documents filed or recorded.

III.

And your orator further shows the Honorable Court that at the time the stipulation was entered into referred to in the preceding paragraph of this bill, the defendant, Mary E. Cronen, plaintiff in the said action at law, and for full and adequate consideration, duly executed a certain written release of your orator, which, among other things, did release, acquit and discharge your orator and his heirs, personal representatives and assigns, of all claims and demands whatsoever, arising out of, or in anywise connected with the said action at law, and also all other claims and demands of whatsoever nature. That a true copy of said release as the same was finally executed, signed and deposited in the custody of the defendant, Security Savings & Trust Company, is hereto attached and marked Exhibit "D", and hereby made a part of this bill as fully as if herein copied at length. That your orator is unable to tender for the use or inspection of the court the original release, or a certified copy thereof, for the reason that the original is in the possession of the Security Savings & Trust Company, which said company neglects and refuses to deliver it to your orator or into the custody of this court except upon the decree or order of this court so to do. And your orator is unable to procure and present a certified copy of said release in connection with the bill for the reason that said release

is not on file or of record in the office of any public officer authorized or competent to certify as required by law, or otherwise.

IV.

Your orator further shows to the court that at the time said stipulation was signed and at the time the release was signed, said documents being hereinbefore referred to as Exhibits "C" and "D", there was prepared and executed as a part of the same transaction, bearing date the 24th day of February, 1912, addressed to Security Savings & Trust Company, duly executed by A. E. Clark, attorney of record for Walter Baker Moore in said action at law, and by John F. Logan and John H. Stevenson, attorneys of record for Mary E. Cronen in said action at law, an instrument, a true copy of which is hereto attached and marked Exhibit "E" and hereby made a part of this bill as fully as if herein copied at length. That said written instrument, among other things, provided for the deposit with the said defendant, Security Savings & Trust Company, of the stipulation for dismissal of said action at law, a copy of which stipulation is hereinbefore referred to and is attached to this bill as Exhibit "C"; also for the release and discharge of Walter Baker Moore which is hereinbefore mentioned, and a copy of which is attached to this bill and marked Exhibit "D" and also for the deposit of a statement signed by Walter Baker Moore certifying, among other things, of the high moral character of the plaintiff, Mary E. Cronen. That said Exhibit "E" also recited that settlement of all

matters and things between the parties to the action at law had been agreed upon and that the sum of \$3,000.00 had been paid. It also provided for the payment of an additional sum of \$3,000.00 within 90 days from the date of the instrument, to-wit, within 90 days from February 24th, 1912, and further provided that when such sum was paid to the defendant, Security Savings & Trust Company, to be paid to John H. Stevenson, attorney for the said Mary E. Cronen, or to his order, that the said Security Savings & Trust Company was to deliver to A. E. Clark, as attorney for Walter Baker Moore, the said stipulation hereinbefore referred to as Exhibit "C" and there was to be delivered to the said John H. Stevenson, as attorney for Mary E. Cronen, the statement hereinbefore referred to, signed by Walter Baker Moore, which among other things, certified to the high moral character of the said Mary E. Cronen. And said instrument further provided that in the event the said sum of \$3,000.00 was not paid within the 90-day period aforesaid, the said stipulation for dismissal and the said release should be delivered to the said John H. Stevenson, attorney for Mary E. Cronen, and the statement signed by Walter Baker Moore above referred to, was to be delivered to A. E. Clark, the attorney for said Moore.

V.

Your orator further shows to this court that there was a full and complete settlement of the said cause agreed upon and that all of the terms, conditions and agreements with respect thereto were incorporated

in, and are contained in the said stipulation for dismissal, the said release and the said instrument under date of February 24th, 1912, addressed to the Security Savings & Trust Company, a true copy of which is hereto attached as Exhibit "E". That on or about the 24th day of February, 1912, and immediately following the execution of said papers, your orator, through his attorney A. E. Clark, paid and caused to be paid to the plaintiff in said law action, to-wit, the said Mary E. Cronen, through her attorneys, John F. Logan and John H. Stevenson, the sum of \$3,000.00, which sum was so paid on the 24th day of February, 1912, or within a day or two thereafter, and at the same time said papers were deposited with the Security Savings & Trust Company. That said sum of \$3,000.00 was so paid by your orator under and pursuant to said settlement and said stipulation, release and other papers hereinbefore referred to and was received and accepted by the said Mary E. Cronen in like manner and has been retained and kept by the said Mary E. Cronen, and has not been repaid, and no offer to repay the same has ever been made.

VI.

And your orator further shows that immediately following the execution of said stipulation, release and communication addressed to Security Savings & Trust Company, that is to say, on the 24th day of February, 1912, or within a day or two thereafter, and at the same time that your orator caused to be paid to the plaintiff in said law action, to-wit, Mary E. Cronen, the sum of \$3,000.00, there was deposited in the

custody of the Security Savings & Trust Company, and pursuant to the terms of the said communication addressed thereto a true copy of which is attached to this bill as Exhibit "E", all of the papers therein referred to, to-wit, the said stipulation for dismissal, the said release and discharge of Walter Baker Moore, and the said statement signed by Walter Baker Moore, and the said Security Savings & Trust Company took and received the custody of the said original papers signed by the parties or by their attorneys, all as hereinbefore alleged, and has kept and retained the custody thereof ever since, and still keeps and retains the said custody and declines and refuses to surrender up the custody thereof except pursuant to the decree or order of this court, all as hereinbefore more specifically alleged.

VII.

And your orator further shows to this court that on the 6th day of May, 1912, and less than 90 days after the 24th day of February, 1912, your orator caused to be paid to, and deposited with, said Security Savings & Trust Company, in strict and full accordance with the terms of said settlement, and particularly the terms of Exhibit "E", the sum of \$3,000.00, said sum being the balance due upon the settlement with the said Mary E. Cronen, the said sum being so paid to, and deposited with the Security Savings & Trust Company with instructions and authority to it to take and pay and deliver the said money in accordance with the said Exhibit "E". That said money was so taken and received by Security Savings

& Trust Company on the date aforesaid under and pursuant to the terms of said settlement and the terms of said Exhibit "E" and without reservation or condition, the said money has been so kept and retained from your orator, and in this connection, your orator is informed by Mr. Jubitz, the secretary of said Security Savings & Trust Company, and therefore believes and alleges the fact to be upon such information, that the said Security Savings & Trust Company ever since said 6th day of May, 1912, has kept and held, and still keeps, and holds, the said sum of \$3,000.00 payable at any time upon request or demand, pursuant to the communication addressed to the Security Savings & Trust Company, a true copy of which is hereto attached as Exhibit "E".

VIII.

And your orator further shows to this court that on or about the 4th day of April, 1912, the said Mary E. Cronen, prepared, signed and caused to be delivered to defendant, Security Savings & Trust Company, a written communication in words and figures as follows, to-wit:

"Portland, Oregon, April 4, 1912.

Security Savings & Trust Company,

Portland, Oregon.

Gentlemen:

You are hereby notified that I have rescinded any and all agreements heretofore made with Walter Baker Moore, Frank Allen Moore, Margaret Gleason Moore, Miles C. Moore, or A. E. Clark, their attorney, in regard to the litigation between myself and

Walter Baker Moore, and together with the escrow agreement between myself and said parties or either of them, and which was deposited with you on or about the 27th day of February, 1912, wherein you were to deliver certain papers executed by me and certain papers executed by some of said parties, upon the payment of \$3,000.00 for my credit.

Said escrow agreement was obtained by fraud and deceit and I will not be bound thereby. In case said escrow is delivered I will be damaged in the sum of \$100,000.00 and I will hold you accountable therefor. You are therefore hereby notified not to deliver the said escrow to any of said parties or to any one or I will hold you for the said damages.

Yours very truly,

(Sgd) MARY E. CRONEN."

That there was no cause, reason or justification for such communication and the only purpose and effect thereof was to embarrass, annoy, and put your orator to expense and difficulty in procuring the delivery to him of the stipulations for, and dismissal of said law action and the release of himself executed by Mary E. Cronen. That in truth and in fact the said stipulation for dismissal, the said release, and all other papers and documents hereinbefore referred to as having been executed by Mary E. Cronen, or by her attorneys, other than the said communication to the Security Savings & Trust Company, were prepared in the office of the attorneys for said Mary E. Cronen, and were at the same place approved and signed.

That when your orator caused to be paid to Security Savings & Trust Company on May 6th, 1912, the said sum of \$3,000.00, he demanded and caused to be demanded through his attorney A. E. Clark, delivery to him through the said attorney of the stipulation for dismissal and the said release of your orator. That repeatedly thereafter your orator, through his said attorney, caused like demand to be made. That on the 6th day of May, 1912, and at all times thereafter, the said Security Savings & Trust Company has failed, neglected and refused to deliver to your orator, through his attorney, A. E. Clark, or otherwise, the said stipulation, or the said release, or either thereof, and the said defendant, Security Savings & Trust Company, alleged and stated to your orator as its reason for so neglecting and refusing to make delivery that it has received the said communication signed by Mary E. Cronen, bearing date April 4, 1912, and hereinbefore set forth at length; that it has no pecuniary interest in the controversy between the parties, if any such controversy exists, and that it does not desire to become involved in litigation or subject itself to any suit or action for damage or otherwise, and that it does not intend to, and will not, deliver to your orator, or upon his order, the said stipulation, or the said release, or either thereof, unless required and compelled so to do by the decree or order of this court, or unless the said Mary E. Cronen personally, or through her duly authorized agents, or attorneys, shall withdraw and rescind the said notice of April 4, 1912, or authorize and direct the said Se-

curity Savings & Trust Company to make delivery of said papers.

IX.

And your orator further shows that the said Mary E. Cronen has refused and neglected to withdraw said notice or authorize and direct the said Security Savings & Trust Company to make said delivery, but on the contrary refuses so to do and your orator, through his attorney, A. E. Clark, has made repeated demands on the said Mary E. Cronen, through her attorneys, to rescind the said notice of April 4, 1912, or to authorize and direct the Security Savings & Trust Company to make delivery of the stipulation and release of your orator and to carry out the terms of the settlement as agreed upon, all as hereinbefore alleged, and that at all times the said Mary E. Cronen, through her said attorneys, has neglected and comply with said demands.

X.

And your orator further shows that the said action at law is now pending and is now at issue in this court, brought by Mary E. Cronen against your orator, wherein the said Cronen prays for a recovery against your orator in the sum of \$100,000.00 together with the costs and disbursements of the action. That as hereinbefore alleged, your orator has paid to the said Cronen and the said Cronen has accepted, and retains, the sum of \$3,000.00 and your orator has paid into Security Savings & Trust Company for the use and benefit of said Cronen, to be paid to her, through her attorneys of record, the additional sum of \$3,000.00,

that is to say, your orator has paid, and has parted with, the sum of \$6,000.00 for said stipulation of dismissal and said release and for the purpose of settling, adjusting and being relieved from the said claim named in said law action of \$100,000.00 and said release and said stipulation for dismissal and the delivery thereof to your orator can only be procured through the interposition of a court of equity, and as ancillary to said law action and the value thereof to your orator exceeds \$3,000.00 and are of the actual value of upwards of \$300,000.00 exclusive of interest and costs. That the matter in controversy and the amount in dispute in this cause exceeds the sum and value of \$3,000.00 exclusive of interest and costs, and that in truth and in fact, the matters in controversy and the amount in dispute, exclusive of interest and costs is the sum of \$100,000.00

XI.

And your orator further shows to this court that he has been deprived of his property, to-wit, the sum of \$6,000.00, as aforesaid; that he has been put to great expense, annoyance in effecting aforesaid settlement, employing counsel and other expenses; that the said Mary E. Cronen threatens and intends to proceed with the prosecution of the said action at law and to retain the sum of \$3,000.00 paid to her, to refuse, and if possible, to prevent a delivery to your orator of the stipulation of dismissal of said action at law and the release of your orator to the end that she may carry on and prosecute in her favor, if possible, said action at law and in the meantime so

wrong, cheat and defraud your orator as to retain the money so paid to her and to prevent and deprive your orator of his right and opportunity to procure and cause to be filed in this court the stipulation for the dismissal of said action at law as aforesaid and the release of your orator which might be pleaded and produced upon the trial of said action at law as a complete bar to further prosecution of said action at law.

XII.

And your orator further shows to the court that he is informed and believes, and therefore alleges, that the said Mary E. Cronen in complete and total defiance of the said stipulation and said release and the said settlement is now preparing, has consulted counsel to that end and threatens and intends to, and will do so unless restrained by the court, to go into another jurisdiction, to-wit, the State of California, where your orator is, and bring suit or action against your orator upon the claim and demands involved in the said action at law.

XIII.

And your orator further shows to the Court that the defendant, Security Savings & Trust Company, is not a party to the action at law, and therefore is not amenable to any order or process of the Court in said case. That defendant retains the said stipulation for dismissal, and the release of your orator and refuses to deliver them, or either thereof, to your orator, or to the Court because of the notice served upon it under date of April 4th, 1912, herein-

before referred to do so unless coerced to make such delivery by the decree or order of this Court. In order that your orator may make proper defense in the said action at law and plead and establish an estoppel created by the papers hereinbefore referred to, and the acts and conduct of the parties aforesaid, and in order that your orator may obtain possession of and cause to be filed in this Court, the stipulation above referred to for the dismissal of the said action upon the merits and procure for his own possession the release above referred to, it has become and is necessary to seek the aid of a Court of Equity in a proceeding wherein the said Security Savings & Trust Company is a party, and the said Mary E. Cronan is a party, to the end that the Court may enforce the terms of the agreement under which the said stipulation and the said release were deposited in the custody of the defendant, the Security Savings & Trust Company, and require and compel the surrender of the said papers to your orator, or to the Registry of the Court, to be dealt with in accordance with the said agreement, and your orator is unable to obtain the said, or any other appropriate relief, in any other tribunal.

XIV.

Your orator further shows to the Court that by reason of the aforesaid wrongful acts of the defendant Mary E. Cronan, and the notice to the Security Savings & Trust Company under date of April 4, 1912, the Security Savings & Trust Company was prevented from delivering the said stipulation, and the

said release to your orator, and by reason of all the premises, and through the unjustifiable conduct of the said Mary E. Cronen your orator has been greatly damaged, has been put to such expense in the employment of counsel, the bringing of this suit and the time spent and service performed in seeking to secure the due execution of the terms of the settlement, all to the great damage and expense of your orator in the sum, to-wit, upwards of One Thousand Dollars (\$1,000.00).

XV.

WHEREFORE doth your orator pray, that the defendant Mary E. Cronen be perpetually enjoined and restrained from further prosecuting the said action at law referred to in the allegations of this Bill, wherein she is plaintiff and your orator is the defendant, and that provisionally and pending the final determination of this cause, that the said defendant Mary E. Cronen be enjoined and restrained from prosecuting the said action at law, or take any steps or proceedings whatsoever with respect thereto, and that she be so provisionally enjoined and restrained from bringing or prosecuting in any other Court, or in any other jurisdiction any suit or action whatsoever based upon the matters, things or causes of action embraced in the said action at law, or upon any other matter or thing, whatsoever, embraced within the release executed by her on February 24th, 1911, as more fully alleged heretofore in this Bill; that the defendant Security Savings & Trust Company, be required

and commanded to bring into this Court the stipulation for dismissal, a true copy of which is attached to this Bill as Exhibit "C", the release of your orator executed by Mary E. Cronen, a true copy of which is attached to this Bill as Exhibit "D", and likewise the sum of Three Thousand Dollars (\$3,000.00), deposited and left with the said defendant Security Savings & Trust Company by your orator on the 6th day of May, 1912, and all other papers and documents deposited in connection with the said settlement, and under and pursuant to the escrow agreement, to be dealt with by this Court in such manner as may be meet and equitable, and that a decree be entered herein for a perpetual injunction, as hereinbefore prayed for, for the delivery of the said release to your orator, the filing, entering and carrying into effect in said action at law of the stipulation for dismissal, and the disbursement of the said sum of Three Thousand Dollars (\$3,000.00) in accordance with the agreement pursuant to which the same was deposited; and that this honorable Court take account of the expense and damage suffered and sustained by your orator, and award the same to him, and for the payment thereof and of the costs and disbursements of this suit impound sufficient of the said sum of Three Thousand Dollars (\$3,000.00), so brought into this Court, and direct that the Clerk of this Court apply to that purpose, and from such fund, sufficient to pay all such costs and disbursements and any sum awarded as costs and damages, and that your orator have such other and further relief as to this Honorable Court

may seem meet, and as shall be agreeable to equity.

And for so much as your orator can have no adequate relief, except in this Court, to the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief prayed for, and may make full, true and direct answers, but not under oath, answer under oath being hereby expressly waived, according to their best and utmost knowledge, information, remembrance or belief, to the several matters or things averred and charged in this Bill, as fully and particularly as if separately and severally interrogated as to each and every of said matters, and may be compelled to do and perform each and every act and thing required by the decree of this Court to be done and performed.

THEREFORE, May it please your honors to grant unto your orator a writ of injunction provisionally, as well as perpetually, as herein prayed for, issuing out of and under the seal of this Honorable Court, commanding and restraining the defendant Mary E. Cronen, as hereinbefore in that behalf prayed. And may it please your honors to grant unto your orator the writ of subpoena issuing out of and under the seal of this Court, to the said defendants, Mary E. Cronen and the Security Savings & Trust Company, commanding them and each thereof by a certain day, and under a certain penalty, to be and appear in this Court, then and there to answer the premises, and

to stand to and abide such order and decree as may be made against them.

And your orator will ever pray,

WALTER BAKER MOORE,

Complainant, by his solicitor.

ALFRED E. CLARK,

His solicitor.

ALFRED E. CLARK,

M. H. CLARK,

Solicitors for Complainant.

STATE OF OREGON,

COUNTY OF MULTNOMAH.—ss.

I, A. E. Clark, being first duly sworn upon oath depose and say that I am the solicitor for the above named Complainant, Walter Baker Moore. That I prepared, and have read the foregoing Bill of Complaint, and know the contents thereof, and have personal knowledge of the matters therein stated except as to such matters as are therein stated distinctly upon information and belief, and that the matters contained in said Bill are true of my own knowledge, except as to such matters as are therein stated upon information and belief, and as to such matters, that I believe them to be true.

This verification is not made by the Complainant for the reason that he is at the present time absent in the state of California, and that your affiant has in fact carried on and conducted the negotiations, and looked after the preparation and execution of all of the papers and other documents referred to in the Bill

of Complaint and involved in this case, and has a more accurate knowledge of the facts than has the Complainant.

ALFRED E. CLARK,

Affiant.

Subscribed and sworn to before me this 17th day of July, A. D. 1912.

J. S. ALEXANDER,

Notary Public for Oregon.

[Exhibit A.]

*In the Circuit Court of the State of Oregon for the
County of Multnomah.*

COMPLAINT.

MARY E. CRONEN,

Plaintiff,

vs.

WALTER BAKER MOORE,

Defendant.

Comes now the plaintiff and for cause of action against the defendant complains and alleges as follows, to-wit:

I.

That heretofore, to-wit, on the 12th day of July, 1909, at the City of Portland, in the State of Oregon, in consideration that the plaintiff, being then sole and unmarried, at the request of said defendant promised to marry the plaintiff and it was then and there agreed by and between the plaintiff and the defendant that they would be married on the return of the defendant from a journey to the State of California,

which journey the defendant was then about to begin and make, it being then and there understood and agreed that he, the defendant, would be absent from the State of Oregon on said journey only about three weeks and that the plaintiff and the defendant would, upon the return of the defendant from said journey to the State of California, be married to each other. That the defendant, within two or three days after said contract and agreement entered into as hereinbefore set out, did leave the State of Oregon for the State of California and was absent from the State of Oregon about two weeks, when he returned again to the City of Portland, Oregon, and it was then and there agreed by and between the plaintiff and the defendant that the marriage of the plaintiff and the defendant should take place and be solemnized some time in the month of January, 1910. That in the month of January, 1910, the plaintiff requested the defendant to marry her in accordance with his said contract and agreement, but so to do the defendant failed and refused and continued so to fail and refuse until the 28th day of February, 1910, when the defendant promised and agreed that if the plaintiff would wait until the 1st day of June, 1910, and continue the said contract of marriage in force and effect until said time, he, the defendant, would, on the said 1st day of June, 1910, marry her, the plaintiff, and in consideration of defendant's said promise, the plaintiff agreed thereto and it was then and there agreed by and between the plaintiff and the defendant that they, the plaintiff and the defendant, would

marry each other on the 1st day of June, 1910. That on the said 1st day of June, 1910, and at divers times thereafter the plaintiff requested the defendant to marry her in accordance with his said contract and agreement, but so to do the defendant failed and refused and ever since said time has failed and refused.

II.

That the plaintiff confiding in and relying upon said promise of the said defendant, as hereinbefore set out, has always since remained and still is sole and unmarried and has been for and during all of the time aforesaid and now is ready and willing to marry the defendant.

III.

That the engagement, contract and agreement of the plaintiff and the defendant to be married to each other, after said contract and agreement was entered into between them, became and was widely known and published among their friends and acquaintances and the public generally and was widely discussed among their said friends, acquaintances and the public generally and the plaintiff received many congratulations upon her prospective marriage with the defendant and was made, in state of mind very happy over the prospect of home and wifehood and that by reason of the failure and refusal of the defendant to marry her in accordance with his contract, promise and agreement as aforesaid, plaintiff was and is much embarrassed, mortified and humiliated and was made

and caused to suffer great worry, shock, shame and distress of mind and to have her hope and view of home and wifehood shattered and destroyed by reason of the failure and refusal of the defendant to marry her according to his contract, promise and agreement as hereinbefore set out.

IV.

That the defendant refuses to marry the plaintiff, although on the 1st day of June, 1910, and at divers times thereafter and prior to the commencement of this action, the plaintiff has requested him so to do and that by reason of the failure and refusal of the defendant to marry the plaintiff as agreed by and between them, and by reason of the facts, matters and things hereinbefore set out, the plaintiff has been and is damaged in the full sum of One Hundred Thousand (\$100,000.00) Dollars.

V.

That during all of the times in this complaint mentioned and set out, the plaintiff was sole and unmarried and willing and capable of contracting marriage and entering into the marriage contract.

WHEREFORE plaintiff prays for a judgment against the defendant in the full sum of One Hundred Thousand, (\$100,000.00) Dollars, and for her costs and disbursements in this action incurred.

JOHN F. LOGAN,
JOHN H. STEVENSON,
Attorneys for plaintiff.

[Exhibit B.]

*In the Circuit Court of the United States for the
District of Oregon.*

ANSWER.

MARY E. CRONEN,

Plaintiff,

v.

WALTER BAKER MOORE,

Defendant.

Now comes the defendant and answering the complaint of the plaintiff herein.

I.

Admits that during all the times mentioned in the complaint, that plaintiff was an unmarried woman and that during all of said times defendant was an unmarried man.

II.

Save and except as admitted in the last preceding paragraph of this answer, this defendant denies each and every allegation, matter and thing contained in the complaint of the plaintiff herein.

WHEREFORE defendant prays that this action be dismissed upon the merits thereof and that he have judgment against the plaintiff for his costs and disbursements.

A. E. CLARK,
Attorney for Defendant.

[Exhibit C.]

*In the District Court of the United States for the
District of Oregon.*

MARY E. CRONEN,

Plaintiff,

v.

WALTER BAKER MOORE,

Defendant.

It is hereby stipulated and agreed by and between the parties to this action, through their respective attorneys, that all matters and things involved in said action have been fully settled and adjusted and the said action may be and the same is hereby dismissed upon the merits and judgment may be entered accordingly, but without costs or disbursements to either party.

JOHN F. LOGAN &

J. H. STEVENSON,

Attorneys for Plaintiff.

Dated February 24th, 1912.

A. E. CLARK,

Attorney for Defendant.

[Exhibit D.]

FOR AND IN CONSIDERATION of the sum of Six Thousand (\$6,000.00) Dollars, in hand paid, the receipt whereof is hereby acknowledged, the undersigned, Mary E. Cronen, does hereby release, acknowledge satisfaction of, acquit and discharge Walter Baker Moore and his heirs, personal representatives and assigns, of all claims and demands whatso-

ever, for costs or damages, or otherwise arising out of, or in any wise connected with the cause of action set forth in a certain complaint wherein the undersigned is plaintiff and the said Walter Baker Moore is defendant, pending in the District Court of the United States for the District of Oregon.

And the undersigned does also release, discharge, acknowledge satisfaction of, and acquit the said Walter Baker Moore and his heirs and personal representatives of any and all claims and demands of whatsoever nature and however arising or accruing, or to arise or accrue, by reason of any matter, thing, or transaction whatsoever, from the beginning of the world until the present time.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 24th day of February, 1912.

MARY E. CRONEN. [Seal]

WITNESSES:

A. E. Clark.

J. H. Stevenson.

[Exhibit E.]

Feby. 24th 1912.

SECURITY SAVINGS & TRUST COMPANY,
City.

Gentlemen:—

There is this day deposited with you the following papers:

- (1) Stipulation for the dismissal of the case of Mary E. Cronen vs. Walter Baker Moore, now pending in the District Court of the

United States for the District of Oregon:

- (2) Release and discharge of Walter Baker Moore of all claims and demands of whatsoever nature signed by Mary E. Cronen.
- (3) Statement signed by Walter Baker Moore, certifying among other things, of the high moral character of Miss Cronen.

Settlement of all matters and things between these parties has been agreed upon and the sum of Three Thousand Dollars has been paid. An additional Three Thousand Dollars is to be paid within 90 days from this date. Upon the payment of such sum to you to be paid to John H. Stephenson, Attorney, or to his order, you are to deliver to A. E. Clark, Attorney for Walter Baker Moore, the stipulation and the release above mentioned and you are to deliver to John H. Stephenson, Attorney for Miss Cronen, the statement above mentioned, signed by Walter Baker Moore.

In the event said sum of Three Thousand Dollars is not paid within the 90 days aforesaid, the escrow shall terminate and the said stipulation and the said release shall be delivered to John H. Stephenson, and the said statement to A. E. Clark.

Yours truly,

A. E. CLARK,

Atty. for Walter Baker Moore.

JOHN F. LOGAN and

J. H. STEVENSON,

Attys. for Mary E. Cronen.

[Endorsed]: Bill of Complaint. Filed July 17, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 5 day of August, 1912, there was duly filed in said Court, a Demurrer in words and figures as follows, to wit:

[Demurrer.]

*In the District Court of the United States for the
District of Oregon.*

WALTER BAKER MOORE,

Complainant,

v.

MARY E. CRONEN and SECURITY SAVINGS
AND TRUST COMPANY, a corporation,
Defendants.

Now comes the defendant, Mary E. Cronen, appearing for herself alone, and demurs to plaintiff's complaint for the reason that the complaint does not state facts sufficient to constitute a cause of complaint against this defendant, and because there is no equity in the complaint and because the court has no jurisdiction of the subject matter of the said suit and of the parties hereto.

OAK NOLAN,
Attorney for Defendant.

Due service of the foregoing demurrer is hereby acknowledged at Portland, Oregon, this 3rd day of August, 1912.

(Sd.) A. E. CLARK,
Atty. for Plff.

[Endorsed] Demurrer. Filed Aug. 5, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on Tuesday, the 6 day of August, 1912, the same being the 31 Judicial day of the Regular July 1912 Term of said Court; Present: the Honorable R. S. BEAN, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Order Overruling Demurrer.]

*In the District Court of the United States, for the
District of Oregon.*

No. 5689.

August 6, 1912.

WALTER BAKER MOORE,

v.

MARY E. CRONAN and THE SECURITY SAV-
INGS & TRUST CO.

This cause came on regularly for hearing upon demurrer to bill of Complaint, A. E. Clark, Esq., appearing for complainant and Oak Nolan, Esq., for defendant; Whereupon after argument of counsel for respective parties demurrer ordered submitted and thereupon after consideration it is Ordered that said Demurrer to bill of Complaint be and the same hereby is overruled and it is further Ordered that defendant have and hereby is granted 10 days to answer herein. And afterwards, to wit, on the 21 day of August, 1912, there was duly filed in said Court, an Answer in words and figures as follows, to wit:

[Answer.]

*In the District Court of the United States for the
District of Oregon.*

WALTER BAKER MOORE,

Complainant,

vs.

MARY E. CRONEN, and THE SECURITY SAV-
INGS & TRUST COMPANY, a corporation,
Defendants.

Now comes Mary E. Cronen; one of the defendants above named, appearing for herself alone, and for answer to plaintiff's complaint herein, admits, denies and alleges as follows:

Admits that this defendant brought an action at law against the plaintiff for \$100,000.00 as alleged in the complaint.

Admits that this defendant executed some instrument in writing which purports to release the plaintiff from all demands arising out of the said action at law.

Admits that plaintiff paid the defendant the sum of \$3000.00 on or about the 24th day of February 1912.

Admits that this defendant served a notice upon the Security Savings & Trust Co., on or about the 4th day of April, 1912, to the effect that the alleged escrow should not be delivered.

This defendant denies each and every other allegation and each and every part, portion and provision of each and every other allegation made and contained in plaintiff's complaint which is not expressly admitted herein.

For a further answer herein to plaintiff's complaint this defendant alleges:

That prior to the 4th day of April 1912, John F. Logan and John H. Stevenson represented this defendant as her attorneys in that certain action at law which is now pending and at issue in the District Court of the United States for the District of Oregon, wherein Mary E. Cronen is plaintiff and Walter Baker Moore is defendant, and A. E. Clark appeared in the said action as the attorney of record for Walter Baker Moore. Some time prior to the 24th day of February 1912, the prospects of reaching a settlement of the said action had been talked over by the said attorneys and this defendant was duly advised of the same. It was understood and agreed that a settlement could be reached if Walter Baker Moore, Frank Allen Moore, Miles C. Moore and Margaret G. Moore would duly make, execute and deliver to this defendant, or cause the same to be delivered, a certain affidavit of vindication and retraction for the wrong which had been done to this defendant by the said parties, and acknowledge in the said affidavit that the said Walter Baker Moore had promised and agreed to marry this defendant as alleged by this defendant in the said action at law, and certify to the good moral character of this defendant and pay the sum of \$6000.00. A. E. Clark thereupon promised and agreed to secure the said affidavit, the wording and form of which was then agreed upon. On the 24th day of February 1912 this defendant was called to the office of her said attorneys in the City of Port-

land, Oregon, and thereupon meet with the said Clark. A. E. Clark thereupon represented that he had secured the said affidavit, and thereupon demanded that this defendant execute a certain instrument in writing which he then produced. A. E. Clark represented to this defendant that the said instrument was intended to release the said Walter Baker Moore from any and all demands and liability to this defendant and that the same would not release any other person or persons from any liability to this defendant on any charges whatever. This defendant relied upon the said representations made by the said Clark and thereupon executed the said instrument. Plaintiff supposed and believed that the said representations were true, and would not have executed the said instrument if she had been truthfully advised as to the meaning of the said instrument, and this fact was well known to the said Clark. Said representations were false because the said instrument purports to release not only the said Moore, but also the heirs and representatives of the said Moore, from all liability to this defendant from the beginning of the world, and Frank Allen Moore, who is a brother of the said Walter Baker Moore, is now claiming to be released from liability to this defendant under and by the terms of the said instrument. A. E. Clark knew that the said representations were false and knew that the said instrument was drawn for the purpose of releasing other persons than the plaintiff from liability to this defendant, and knew that this defendant was being misled to her damage in the execution

of the said instrument. It then developed that the said Clark had no affidavit executed by the said parties, but did have some statement executed by Walter Baker Moore alone, but the same was not verified. A. E. Clark expressed himself as being very anxious to arrive at some settlement because the said action at law was set for trial in the said Court within the next few days. It was then agreed that A. E. Clark should certify that the said instrument had been executed by the said Walter Baker Moore and should be delivered to this defendant. A. E. Clark then agreed that he would secure the required affidavits from Miles C. Moore, Frank Allen Moore and Margaret G. Moore and deliver the same to the defendant within the next day or two. The contents wording and form of the said affidavit to be executed by the said parties was then agreed upon. Thereupon the said Clark told this defendant that Miles C. Moore was on his way to China or to some other foreign country and for that reason it would be impossible to secure the affidavit from him within the next day or two, but that he would have the same on or before the expiration of 90 days and would deliver the same to the defendant by that time. It was then understood and agreed that the statement executed by the said Walter Baker Moore and the affidavits agreed upon and to be executed by Frank Allen Moore and Margaret G. Moore should be delivered to the defendant within the next day or two and should be recorded in the miscellaneous records of Multnomah County, Oregon, that the defendant might refer her friends to

the said records for a full and complete retraction and vindication from the wrong which had been done to the defendant by the said parties. It was also understood and agreed that a statement to the effect that a settlement had been reached by the said parties should be given to the newspapers for publication. It was further understood and agreed that \$3000.00 should be paid in cash to the defendant, and that the remaining \$3000.00 should be paid on or before the expiration of 90 days. That the instrument of release executed by the defendant should be deposited in escrow with the Security Savings & Trust Company to be delivered to the plaintiff upon payment of the said \$3000.00. It was also expressly understood and agreed that in case A. E. Clark should fail to secure the affidavit which had been agreed upon, from Frank Allen Moore and Margaret G. Moore and deliver the same to the defendant within the next day or two, that the payment of \$3000.00 in cash, should be forfeited to this defendant and that the release executed by her should be returned. It was understood and agreed that the said forfeiture should stand as a security to the defendant that the terms of the said contract would be carried out and that the said affidavits would be secured and delivered to the defendant within the next day or two. This defendant never had any other or different understanding or contract with the plaintiff in regard to the said matter. The statement executed by Walter Baker Moore has never been delivered to this defendant, and no affidavit of retraction or vindication executed by Miles C. Moore,

Frank Allen Moore or Margaret G. Moore as agreed upon or otherwise, has ever been made or delivered or offered to be delivered to this defendant. On the 4th day of April 1912, and after repeated demand for the said affidavits, this defendant notified the Security Savings & Trust Company that the instrument of release which had been executed by this defendant should not be delivered to the plaintiff. Plaintiff has never carried out the terms of the said contract with this defendant and has never offered or tendered performance thereof. This defendant further alleges, that Miles C. Moore was not on his way to China or to any other foreign country on the 24th day of February 1912, but the said Moore was within reach where the affidavit from him might have been secured within a day or two. A. E. Clark knew that the said Moore was not on his way to China or to any other foreign country and knew that the said Moore was within reach where the said affidavit might have been secured within the next day or two. A. E. Clark made the said false statement in order that defendant should waive her demands for an affidavit from him to be delivered to her within the next day or two. Defendant would not have waived her demands for an affidavit from the said Miles C. Moore to be delivered within the next day or two if she had been truthfully advised as to the whereabouts of the said Moore, and this fact was well known to the said Clark. This defendant further alleges, that neither Miles C. Moore, Frank Allen Moore or Margaret G. Moore ever intended to make, execute or deliver the agreed affi-

davit or any affidavit of retraction or vindication in favor of the defendant, and this fact was well known to the said Clark. That A. E. Clark promised and agreed to secure the said affidavits from the said parties and agreed to deliver the same within the next day or two in order to secure the release executed by the defendant and intended thereby to defraud the defendant. This defendant relied upon the promise of the said Clark to secure and deliver the said affidavits within the next day or two, and supposed and believed that the same would be secured and delivered according to the said contract, otherwise defendant would not have executed the said release, and this fact was well known to the said Clark.

Now having fully answered plaintiff's complaint, defendant prays that a decree be made and entered in favor of this defendant, dismissing plaintiff's complaint and for costs of this suit.

Defendant

OAK NOLAN,

Attorney for defendant.

[Endorsed]: Answer of Defendant Mary E. Cronen. Filed Aug. 21, 1912.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 23 day of August, 1912, there was duly filed in said Court, a Replication in words and figures as follows, to wit:

[Replication.]

*In the District Court of the United States for the
District of Oregon.*

WALTER BAKER MOORE,

Plaintiff,

v.

MARY E. CRONEN and SECURITY SAVINGS &
TRUST COMPANY, a corporation,

Defendants.

This replicant, saving and reserving to himself, all and all manner of exceptions or advantage which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the defendant, Mary E. Cronen, for replication thereunto saith that he doth and will maintain and prove his said bill to be true, certain and sufficient in law to be answered unto by the said defendant and that the answer of the said defendant is very uncertain, evasive and insufficient in law to be replied unto by this replicant. And this replicant further replying, denies each and every allegation contained in said answer except wherein the same admit the allegations of the bill of complaint, all of which matters this replicant is ready to maintain and prove as this Honorable Court shall direct and humbly prays as in and by his said bill he hath already prayed.

A. E. CLARK & M. H. CLARK,
Solicitors for Replicant.

[Endorsed]: Replication to Answer of Mary E. Cronen. Filed Aug. 23, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 9 day of September, 1912, there was duly filed in said Court, a Decree in words and figures as follows, to wit:

[Decree.]

*In the District Court of the United States for the
District of Oregon.*

WALTER BAKER MOORE,

Complainant,

vs.

MARY E. CRONEN, and the SECURITY SAV-
INGS & TRUST COMPANY, a corporation,
Defendants.

This cause came on to be heard upon the merits during the present term of this Court and upon the 4th day of September, 1912, upon the pleadings and proofs of the parties.

The complainant appeared by his solicitors, A. E. Clark and M. H. Clark. The defendant Mary E. Cronen appeared in person and by her solicitor Oak Nolan. It appeared that the Security Savings & Trust Company had been duly served in this cause with subpoena and certified copy of the bill of complaint in Portland, Oregon, on the 17th day of July, 1912, and that said defendant had not appeared, answered, or otherwise pleaded in the cause was in default.

And the Court having considered said cause and the proof therein and the arguments for counsel thereupon and upon consideration thereof, it is

ORDERED, ADJUDGED and DECREED, That the stipulation for the dismissal of the action at law

now pending in this Court wherein Mary E. Cronen is plaintiff and Walter Baker Moore is defendant, a true copy of which is attached to the bill of complaint in this cause as Exhibit "C" and brought into this Court upon the trial be delivered up to the complainant, or to his solicitor, A. E. Clark, for entering and filing therein in the said action at law and that the release, executed by the defendant Mary E. Cronen, of the complainant Walter Baker Moore brought into Court upon the trial of this cause by the defendant Security Savings & Trust Company and offered and received in evidence, a true copy of which is attached to the bill of complaint herein as Exhibit "D" be surrendered up and delivered into possession of the complainant, or his solicitor, A. E. Clark; that the defendant Security Savings & Trust Company bring into and deposit in the registry of this Court the sum of Three Thousand (\$3,000.00) Dollars deposited and left with the said defendant by the complainant in this cause on or about the 6th day of May, 1912, and that said sum, after deducting therefrom the costs and disbursements of this cause taxed in favor of the complainant, be paid over to John H. Stevenson, attorney for Mary E. Cronen in the said action at law, or paid out upon his order and that the amount so deducted from said sum in payment of said costs and disbursements be paid over to complainant or to his solicitor, A. E. Clark, or to the order thereof. That a certain paper by way of certificate of the character of the defendant Mary E. Cronen signed by Walter Baker Moore brought into this Court upon

the trial thereof by the defendant Security Savings & Trust Company and which was referred to and identified as "Statement signed by Walter Baker Moore certifying among other things, of the high moral character of Miss Cronen" in instructions to the defendant Security Savings & Trust Company signed by A. E. Clark as attorney for Walter Baker Moore and by John F. Logan and John H. Stevenson, as attorneys for Miss Cronen, a copy of which instructions is attached to the bill of complaint as Exhibit "E" be delivered to the defendant Mary E. Cronen, or her order. And it is

FURTHER ORDERED, ADJUDGED and DECREED That the defendant Mary E. Cronen be, and is hereby perpetually enjoined and restrained from prosecuting further the action at law above referred to brought by her to recover damages as for a breach of promise of marriage against the complainant herein and now pending in this Court and from taking any further steps or proceedings whatsoever with respect thereto and that the stipulation for the dismissal of the said action at law be entered and filed in said cause and judgment of dismissal entered pursuant thereto. And it is

FURTHER ORDERED, ADJUDGED and DECREED, That the plaintiff have and recover from the defendant, Mary E. Cronen, his taxable costs and disbursements herein, to be paid out of the sum of the Three Thousand (\$3000.00) Dollars required to be deposited in the registry of this Court by this decree,

said costs and disbursements being taxed and allowed
at the sum of

..... Dollars.

R. S. BEAN,
Judge.

[Endorsed]: Decree. Filed Sept. 9, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 17 day of February,
1913, there was duly filed in said Court, a Trans-
cript of Testimony in words and figures as fol-
lows, to wit:

[Transcript of Testimony.]

*In the District Court of the United States for the
District of Oregon.*

Portland, Oregon, September 4, 1912.

WALTER BAKER MOORE,

Plaintiff,

vs.

MARY E. CRONEN,

Defendant.

A. E. CLARK, Attorney for Complainant.

OAK NOLAN, Attorney for defendant.

Before R. S. BEAN, District Judge.

JOHN H. STEVENSON, a witness called on be-
half of the plaintiff, being first duly sworn, testified
as follows:

Direct Examination

Questions by Mr. CLARK:

Mr. Stevenson, you live in this city?

A. Yes, sir.

Q. And what is your business or profession

A. Lawyer.

Q. Admitted to practice in the courts of Oregon?

A. Yes, sir.

Q. How long have you been engaged in that profession?

A. Since 1907.

Q. With whom, if any one, are you associated in the practice of your profession?

A. John F. Logan.

Q. And he is an attorney of this court and the courts of Oregon?

A. He is.

Q. How long have you been associated with him?

A. About four years. I believe.

Q. I believe that you and Mr. Logan were the attorneys for the defendant Mary E. Cronen in the action at law brought by her against Walter Baker Moore?

A. We were, yes, sir.

Q. To recover damages for a breach of promise?

A. Yes, sir.

Q. That was an action at law to recover damages in the sum of \$100,000?

A. That is correct.

Q. And I believe that that action was removed from the Multnomah County Court to this court?

A. Yes, sir.

Q. And do you know who appeared as attorney of record for the defendant?

A. The defendant in it?

Q. Walter Baker Moore.

A. A. E. Clark.

Q. That is myself?

A. Yes, sir.

Q. Now, were you the attorney—you and Mr. Logan the attorneys for Miss Cronen in February, 1912?

A. We were, yes.

Q. And were you ever discharged from the case?

A. Well, I don't know. I think we were never formally discharged, never in substance—well, there may be—

Q. I think possibly there was—

A. I believe there was.

Q. Some proceedings had in July of this year?

A. We were, I believe, discharged from that.

Q. Some time in—well, in this summer?

A. In July, I believe, yes.

Q. Now, do you recall the circumstances of a settlement being arrived at in February, 1912?

A. Yes, sir, I was—I took part in it. I negotiated the settlement.

Q. And where were the papers relating to that settlement signed?

A. In Mr. Logan's and my office.

Q. And were some of those prepared in your office that day—during the course of the negotiations?

A. They were, yes.

Q. And who were present when the negotiations occurred, and when the papers were signed?

A. Yourself and Miss Cronen, Mr. Logan and myself.

Q. All in the same room?

A. Yes, sir.

Q. Who were there representing Miss Cronen?

A. Mr. Logan and myself.

Q. And I was in the midst of all you alone?

A. Yes, sir.

Mr. CLARK: Probably the orderly way would be to have shown that these papers were produced by the Security Savings and Trust Company, but I will show that shortly, your Honor.

Q. I call your attention to a paper under date of February 24, 1912, addressed to the Security Savings & Trust Company, and purporting to have been signed by myself as attorney for Walter Baker Moore, and by John H. Stevenson as attorney for Mary E. Cronen, and I will ask you whether or not you signed that paper?

A. I did, yes sir.

Q. And state whether or not that paper was signed in your office upon the 24th day of February?

A. It was.

Q. And in whose presence?

A. In the presence of Miss Cronen, yourself, Mr. Logan and myself.

Q. State whether or not Miss Cronen was fully advised by you and Mr. Logan of the contents of that paper?

A. As far as I know, she was.

Q. She was present during the entire negotia-

tions?

A. She was at that time.

Q. And you understood what the paper contained?

A. I did.

Q. And you were representing her as her attorney?

A. Yes, sir.

Mr. CLARK: I will offer in evidence this original paper. There is a copy attached to the complaint as Exhibit A.

Mr. NOLAN: We would like if they will introduce it. We have no objection to the introduction of it, as long as it is confined to the purposes of this case alone. I would like to have the court make that order, that they be for that purpose alone.

Mr. CLARK: We only offer it for the purpose of this case.

COURT: Only for evidence in this case.

Paper Marked "Plaintiff's Exhibit 1".

Mr. CLARK: I will introduce all these four papers. I will offer them and read them all together, as they constitute one series.

Q. I also call your attention, Mr. Stevenson, to what purports to be a stipulation for a dismissal of the law action referred to, and purporting to be signed by you and by myself representing the plaintiff and defendant.

A. It is such a stipulation, and I so signed.

Q. Signed by you, and by myself?

A. Yes.

Q. And when was that signed?

A. At the same time, the 24th of February, this year.

Q. And in the presence of Miss Cronen?

A. Same parties.

Q. Did you understand fully what you were doing when you signed the stipulation?

A. I think so.

Q. And do you know whether Mr. Logan also was fully cognizant of the contents and character of the stipulation?

A. As far as I am advised, he was.

Q. And state whether or not the matter of the stipulation and its force and effect was discussed in the presence of Miss Cronen?

A. I believe so.

Mr. CLARK: I offer the stipulation in evidence.

Marked "Plaintiff's Exhibit 2".

Q. I call your attention now to another paper purporting to be a release signed by Mary E. Cronen, witnessed by yourself and myself.

A. That is such a release, and is signed by yourself and myself.

Q. As witnesses?

A. As witnesses.

Q. And by Mary E. Cronen?

A. Yes, sir.

Q. Where was that instrument signed?

A. In my office on the 24th of February, 1912.

Q. State whether or not this instrument was read to, or read by Miss Cronen, before she signed it?

A. Yes.

Q. Do you remember any incident in connection with the language used in this release, which calls to your mind the fact that it was fully discussed at the time?

A. The only thing I recall now is the discussion of the breadth and scope of the release, as to whether or not it had the effect of discharging Walter Baker Moore, and his heirs alone, or whether it also had the effect of discharging his family—relations.

Q. And that was a discussion that arose in the presence of Miss Cronen?

A. Yes.

Q. And before the release was signed?

A. Yes.

Q. And it was the subject of discussion, was it not, between Mr. Logan and yourself, and Miss Cronen and myself?

A. It was.

Q. With respect to the scope of the release?

A. Yes, sir.

Q. After which the release was signed?

A. That is correct.

Mr. CLARK: We offer in evidence the release. Marked "Plaintiff's Exhibit 3".

Q. I show you another paper, and ask you whether or not that was produced at the time of the settlement, and made a part of the papers that were to be deposited in escrow?

A. It was.

Q. Do you remember by whom it was produced?

A. By you.

Q. Do you remember whether or not we had taken two or three weeks to get that in just the form that would be satisfactory to Miss Cronen?

A. Some considerable time, I recall.

Q. And do you recall the form which you finally sent over was the form that was finally adopted and signed?

A. I believe this is substantially, if not exactly, the form that I sent over.

Mr. CLARK: The paper last referred to by the witness is offered in evidence.

Marked "Plaintiff's Exhibit 4".

Q. I note on this paper, following the signature of Walter Baker Moore, is this "I hereby certify that the above signature is that of Walter Baker Moore", dated February 24, 1912, and signed by me. Do you remember how, in the course of the negotiations there, I came to put that certificate on?

A. I think there was a request.

Q. Do you remember who made the request?

A. I believe Miss Cronen mentioned it, and I believe I asked you to certify it. You certified—verified the signature.

Q. In other words, you were taking—in the course of that settlement, you weren't taking chances as to whether or not that was Walter Baker Moore's signature?

A. I think we wanted it verified.

Q. And you were extremely careful, were you not, in all the details of the negotiation?

A. We tried to be.

Mr. CLARK: I will read these papers to your Honor now, so as to get the sequence.

“Portland, Ore, Feb. 24th, 1912.

Security Savings and Trust Company,
City.

Gentlemen:

There is this day deposited with you the following papers:

(1) Stipulation for dismissal of the case of Mary E. Cronen v. Walter Baker Moore, now pending in the District Court of the United States for the District of Oregon.

(2) Release and discharge of Walter Baker Moore of all claims and demands of whatsoever nature, signed by Mary E. Cronen.

(3) Statement signed by Walter Baker Moore, certifying, among other things, of the high moral character of Miss Cronen.

Settlement of all matters and things between these parties has been agreed upon, and the sum of Three Thousand Dollars has been paid. An additional Three Thousand Dollars is to be paid within ninety days from this date. Upon the payment of such sum to you, to be paid to John H. Stevenson, Attorney, or to his order, you are to deliver to A. E. Clark, Attorney for Walter Baker Moore, the stipulation and the release above mentioned, and you are to deliver to John H. Stevenson, attorney for Miss Cronen, the statement above mentioned, signed by Walter Baker Moore.

In the event said sum of Three Thousand Dollars is not paid within the ninety days aforesaid, the escrow shall terminate, and the said stipulation and the said release shall be delivered to John H. Stevenson, and the said statement to A. E. Clark.

Yours truly,

A. E. Clark,

Atty. for Walter Baker Moore.

John H. Stevenson,

Atty. for Mary E. Cronen."

Plaintiff's Exhibit 2.

*"In the District Court of the United States for the
District of Oregon.*

MARY E. CRONEN,

Plaintiff,

vs.

WALTER BAKER MOORE,

Defendant.

It is hereby stipulated and agreed by and between the parties to this action, through their respective attorneys, that all matters and things involved in said action have been fully settled and adjusted, and the said action may be, and the same is hereby dismissed upon the merits, and judgment may be entered accordingly, but without costs or disbursements to either party.

John H. Stevenson,
Attorney for Plaintiff.

Dated February 24, 1912.

A. E. Clark,
Attorney for Defendant."

Plaintiff's Exhibit 3.

"For and in consideration of the sum of Six Thousand Dollars (\$6,000), in hand paid, the receipt whereof is hereby acknowledged, the undersigned Mary E. Cronen does hereby release, acknowledge satisfaction of, and acquit and discharge Walter Baker Moore, and his heirs, personal representatives and assigns of all claims and demands whatsoever, for causes of damages or otherwise arising out of, or in anyways connected with the cause of action set forth in a certain complaint, wherein the undersigned is plaintiff, and the said Walter Baker Moore is defendant, pending in the District Court of the United States for the District of Oregon.

And the undersigned does also release, discharge, acknowledge satisfaction of, and acquit the said Walter Baker Moore, and his heirs and personal representatives of any and all claims and demands of whatsoever nature and however arising or accruing, or to arise or accrue by reason of any matter, thing, or transaction whatsoever, from the beginning of the world until the present time.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 24th day of February, 1912.

Mary E. Cronen. [Seal.]

Witnesses:

A. E. Clark.

John H. Stevenson."

Q. There isn't any question about that being Mary E. Cronen, is there?

A. I think not.

Q. Didn't she sign in your presence on that day?

A. It is. I witnessed it.

Q. You witnessed it.

Mr. CLARK: The next paper is entitled

*In the Circuit Court of the United States for the
District of Oregon.*

MARY E. CRONEN,

Plaintiff,

vs.

WALTER BAKER MOORE,

Defendant.

WHEREAS, there is now pending in the above entitled court an action by Mary E. Cronen against the undersigned, to recover damages for breach of a marriage contract, and,

WHEREAS, the measure of damages in said action has been determined and adjusted, Therefore, this declaration is by me made voluntarily:

That at one time an engagement of marriage existed between us, and the same was broken by me for reasons wholly personal to myself, and for causes in no wise imputing fault or unworthiness to Miss Cronen. That Miss Cronen is a woman of high and unimpeachable moral character, and of my own knowledge I am prepared to say that any statements or intimations to the contrary are unfounded and untrue.

Walter Baker Moore.

I certify that the above signature is that of Walter Baker Moore.

A. E. Clark.

Dated February 24, 1912."

Q. I will ask you if this is the stipulation?

A. It is.

Q. Plaintiff's Exhibit 2 is the stipulation referred to in these instructions to the escrow?

A. It is.

Q. "Release and discharge Walter Baker Moore of all claims, and demands of whatsoever nature, signed by Mary E. Cronen." I will ask you if Exhibit 3 is the release referred to in these instructions?

A. It is.

Q. "Statement signed by Walter Baker Moore, certifying among other things of the high moral character of Miss Cronen." I will ask you whether or not Exhibit 4 is the statement referred to in the instructions?

A. It is.

Q. Now, Mr. Stevenson, after these papers had been agreed upon and signed, what was done with them that day?

A. They were left with me until the following day.

Q. What for?

A. Until you could make arrangements to deposit the money in escrow, to pay over the—

Q. First three thousand dollars?

A. (Continuing) First three thousand dollars.

Q. I didn't have the \$3,000 with me at that time. Do you remember how I happened to go over to your office that day in connection with this matter?

A. I think I asked you to come over, as I recall now.

Q. The amount of the settlement had been a subject of considerable negotiation, had it not?

A. Yes.

Q. For a long time. Is it not a fact that your office insisted on having a minimum of \$7500?

A. Why, I don't recall the minimum.

Q. You started with something considerably bigger than that, some thirty or forty thousand, but you eventually got down to what you declared to be an irreducible minimum of \$7500. Do you recall that?

A. I don't recall the irreducible minimum, or we would probably have adhered to it.

Q. Well, I understand; but reduced to a minimum, and I got up to \$5,000, and there we hung until in February, 1912. Do you remember that?

A. I don't recall, Mr. Clark, the exact time when we reached the \$6,000 stage, but it was some little time before the papers were signed.

Q. More than two or three weeks?

A. Well, it was probably two or three weeks.

Q. Probably two or three weeks?

A. Somewhere along there.

Q. Then the question arose as to the form of this retraction of Walter Baker Moore?

A. Yes.

Q. And I drew that, and you sent it back to me with these lead pencil notations, and was finally signed in the exact form as corrected by you.

A. That is not the form that was finally adopted.

Q. That is the form that was finally signed?

A. No.

Q. Isn't it?

A. No.

Q. Are those your lead pencil corrections?

A. These are, yes, but this is not the form that was finally signed. For instance, the matter here referring to the measure of damages, if I recall, is not in the certificate as signed, and the matter referring to the above entitled court.

Q. Now, let's read them, and see if the one you sent back to me as corrected, isn't the one as finally signed: "Whereas, as there is now pending in the above entitled court, an action by Mary E. Cronen, against the undersigned to recover damages for breach of a marriage contract, and whereas, the measure of damages in said action has been determined and adjusted—"

A. I guess you are right.

Q. (Continuing) "Therefore, this declaration is by me made voluntarily." As a matter of fact, Mr. Stevenson, I took the form you sent, and took it down and had it signed.

A. I know, but I had forgotten that was the form.

Q. You remember a good deal of discussion between you and your client, and you and me as to the form?

A. Yes, a great deal.

Q. And I finally adopted with great reluctance the form you and your client agreed upon?

A. I remember, but I had forgotten that was the form. I see now it is.

Q. When these papers were all signed, including

this certificate of Mr. Moore, I left them all with you?

A. Yes, sir.

Q. Until such time as the \$3,000 was paid—the first \$3,000?

A. Yes, sir.

Q. Do you remember why they were left with you that day?

A. Well, I presume they were left with me until such time as you could pay the initial \$3,000.

Q. Yes, but my paper and yours were all left in your custody?

A. Yes, all.

Q. Do you remember Miss Cronen saying she rather have all the papers remain with her attorney until the \$3,000 was paid?

A. I don't recall that.

Q. Anyway, they were left there?

A. They were left there, that is true.

Q. A day or two later, do you recall my telephoning you to meet me at the Security Savings and Trust, and I would pay the \$3,000?

A. The next day.

Q. The next day, and to bring the papers with you?

A. Yes, sir.

Q. What papers did you bring with you?

A. All the papers that are in escrow.

Q. State whether or not there was at that time deposited in escrow with the Security Savings and Trust Company the papers introduced in evidence.

A. They were deposited.

Q. You were there at the time?

A. Yes, sir.

Q. Did I pay you for Miss Cronen the sum of \$3,000 on that day?

A. Yes, sir.

Q. And that was taken and received, and accounted for to Miss Cronen?

A. Yes, sir.

Q. And that has been kept, has it not, as far as you know?

A. As far as I know anything about.

Q. As far as you know, no part of it has ever been returned, or offered to have been returned?

A. Not as far as I know.

Q. It was paid over to, and accounted for, to Miss Cronen?

A. It was.

Q. Now, I will ask you again if, as far as you are concerned, you had a full and complete understanding of the contents and nature of the papers which were signed upon the day of the settlement?

A. I did have.

Q. And understood exactly what was going on?

A. Yes, sir.

Q. And state whether or not during the entire discussion of the case, and in the discussion of all these papers, Miss Cronen was present in the room?

A. She was.

Q. And state whether or not Mr. Logan, your associate, was present a good share of the time, and par-

ticipated in the discussion and in the council with respect to the character of these papers?

A. I was all the time; Mr. Logan was there the greater part of the time.

Q. Were you advised that Miss Cronen had served upon the Security Savings and Trust Company, about April 4th, of this year, a notice stating that she would not be longer bound by the escrow agreement?

A. I heard it, yes, sir. I heard it, I think, from you, and I think Miss Cronen also told me.

Q. Were you advised of the fact before the notice was served?

A. No, I was not.

Q. Do you know who prepared the notice?

A. I do not.

Q. Your office did not?

A. It did not.

Q. Did your office advise that the notice should be given?

A. No. I did not. I don't think Mr. Logan did.

Q. You never heard?

A. No.

Q. Was your office advised, or were you, as Miss Cronen's attorney advised, before the expiration of the 90 days fixed in the escrow agreement, that the additional sum of \$3,000 had been paid into the bank?

A. Yes, I believe you advised me that you had paid it, or were ready to pay it. I think you told me you had paid it.

Q. Yes.

A. Or were going to pay it. I don't remember

you told me you had paid it. I know you told me you were prepared to pay it at some stage, I think within 90 days.

Q. You remember I phoned you, and sent you written notice?

A. Yes.

Q. And that written notice advised I had actually paid it in about the 8th of May?

A. Yes, I recall it now. You did send the notice.

Q. And requested that the settlement be carried out by the delivery of the papers to the respective parties?

A. Yes, sir.

Q. And why was that not done? I requested you, did I not, to authorize the Security Savings and Trust Company, in behalf of Miss Cronen, to release or to deliver the papers that were coming to us?

A. Yes, sir, you did.

Q. And why was not that done?

A. Miss Cronen objected to it.

Q. You consulted with her, and—

A. Yes.

Q. (Continuing) Requested her to accede to that.

A. We advised with her as to the expediency of it several times.

Q. At the same time that these papers were signed—this, perhaps, has not a direct bearing upon the case, your Honor, except that it is raised in their answer—there were some papers signed with respect to Frank A. Moore at the same time, and inasmuch as

some question, or it is suggested in their answer in the suit in equity of a similar nature, brought by Frank, and also in this case, that one of the wrongs we perpetrated upon Miss Cronen at this time was to induce her to sign a release which purports to release Walter, or which she understood only released Walter, but by adding the words "heirs, representatives and assigns," that we now claim it also releases Frank, and everybody else connected with the Moore family. They allege that affirmatively, as well as the wrongs that Mr. Logan, Mr. Stevenson and myself perpetrated.

Q. Were there some other papers signed at that time, Mr. Stevenson?

A. There were, yes, sir.

Q. I show you a paper purporting to be signed by you as attorney for Mary E. Cronen and myself, as attorney for Walter Baker Moore.

A. Yes, sir, that is the stipulation.

Q. Was that signed by you?

A. Signed at the same time by myself and yourself.

Q. And then the next paper attached to it is what purports to be a release signed by Mary E. Cronen?

A. Yes, sir.

Q. And was that signed by her at that time?

A. It was, yes, sir.

Q. Where were those papers prepared?

A. They were prepared in our office.

Q. Do you remember where they were dictated?

A. In my room, I believe.

Q. And while Miss Cronen was seated by the table?

A. Yes, she was present.

Q. And you were seated on one side of the table?

A. Yes.

Q. Dictated to the stenographer in your office?

A. Yes, sir.

Q. And dictated after the scope and character of the papers had been discussed?

A. Yes, sir; yes, sir.

Mr. CLARK: I offer these papers in evidence. Copies of these papers, Mr. Nolan, are attached to the answer and complaint. I offer in evidence the stipulation referred to, signed by Mr. Stevenson and Myself, and the release signed by Mary E. Cronen.

Stipulation marked "Plaintiff's Exhibit 5".

Release marked "Plaintiff's Exhibit 6".

Stipulation read as follows:

"It is hereby stipulated and agreed as follows:

That a release and acquittance, a duplicate original of which is hereto attached, and signed by Miss Mary E. Cronen is deposited in escrow with the Security Savings & Trust Company, of Portland, Oregon. Upon the delivery to the said Security Savings & Trust Company of a written statement signed by Frank Allan Moore and Margaret Gleason Moore, in the following form, for delivery to John H. Stevenson or John F. Logan, attorneys for Miss Mary E. Cronen, or their order, the said release aforesaid, shall be released from the escrow and delivered to A. E. Clark, or his order; said statement to be signed

to be in this form:

"We, the undersigned, have known Miss Mary E. Cronen well and intimately for many years, and to our own knowledge she is a gentlewoman of a high standard of moral character."

The said instrument is to be dated and witnessed when signed.

There is deposited at this time in escrow a stipulation, release and a statement signed by Walter Baker Moore to be delivered to respective parties in accordance with instructions to the Security Savings & Trust Company, upon the payment of the sum of Three Thousand (\$3,000.00) Dollars.

The release herein referred to is to be delivered to A. E. Clark, and the written statement aforesaid to the aforesaid attorneys for Mary E. Cronen when said sum of \$3,000 is paid, and upon failure to make such payment as provided for in the instructions to the escrow agent, the release is to be surrendered to said attorneys for Mary E. Cronen, and the statement to the said A. E. Clark.

Dated at Portland, Oregon, this 24th day of February, 1912.

John H. Stevenson
of Attorneys for Mary E. Cronen.

A. E. Clark,
Attorneys for Walter Baker Moore.

Mr. CLARK: The Court will observe that the statement which was to be signed by Frank Allan Moore and Margaret Gleason Moore was not depos-

ited in escrow at that time, but it says "upon the delivery to the said Security Savings and Trust Company", I was to prepare that letter and all the papers were to be delivered together.

This is the release:

"For and in consideration of the sum of \$1.00 and other valuable consideration in hand this day paid, the receipt whereof is hereby acknowledged, the undersigned does hereby release, acquit and acknowledge satisfaction of all claims and demands of whatsoever nature however arising, which she may have against Frank Allan Moore, Margaret Gleason Moore and Miles C. Moore, or either of them, from the beginning of the world up to the present time.

IN TESTIMONY WHEREOF, I have hereunto set my hand and seal on this the 24th day of February, A. D. 1912.

Mary E. Cronen [SEAL]"

Q. Both of these papers, I understand, were prepared that day, during the course of the discussion in your office, and by your stenographer?

A. Yes, sir.

Q. And signed at the same time?

A. Yes, sir.

Q. Now, do you remember how the discussion of getting the so-called retraction from Frank Moore and his wife came up?

A. I think it was brought up by Miss Cronen.

Q. That day?

A. Yes.

Q. We had never discussed that between us be-

fore, had we?

A. Yes, it had been discussed.

Q. I mean with me.

A. I think I had mentioned it to you.

Q. Well, did you ever—you remember the forms that you had submitted from time to time.

A. I don't think that—the forms which I had always submitted at Miss Cronen's instance, was a form in which it was stated that the engagement between Miss Cronen and Walter Baker Moore had been broken off by reasons personal to himself and his family, and the phrase "my family" was objected to, as I understand, by Miss Cronen. That was the reason that that did not go into this, but Miss Cronen was always very insistent that there should be some certificate from the family. How clearly you understood that, I am not prepared to say.

Q. But I mean the form you had prepared and submitted to me from time to time related solely to Walter Baker Moore?

A. Except the words "my family".

Q. I mean the certificate to be signed by Walter Baker Moore.

A. Yes, I had submitted to you, I think, no certificate applying to heirs or family.

Q. And the certificate I produced that day, when you invited me over to a settlement, was a certificate you had prepared in regard to Walter Baker Moore.

A. That is correct.

Q. And when we got there, Miss Cronen suggested a certificate from some other members of the fam-

ily. Do you recall I said, "Very well, if you want that, you will have to sign a release of those people"?

A. Yes.

Q. And it was upon that understanding that this stipulation was drawn up, and she signed the release which was to go in escrow with the bank, and I was to procure from Frank Moore and his wife a certificate in the form which is set forth in this stipulation?

A. That is correct.

Q. Now, do you recall who got up the wording of the form in that certificate?

A. No, I don't accurately.

Q. It was gotten up that day, was it?

A. It was gotten up among us, I presume. I think you dictated the form, Mr. Clark, to the stenographer.

Q. Now, just to refresh your memory: Don't you remember that somebody suggested the use of the words "gentle woman of a high standard of moral character"?

A. Miss Cronen wanted that.

Q. Miss Cronen wanted that phraseology?

A. She wanted the use of the word "gentlewoman".

Q. And it was put in at her request?

A. It was. It was put in, undoubtedly, at her request.

Q. And do you remember that Mr. Logan, with his usual desire for accuracy, went and looked that up to see what it meant, or at least got a book and told us exactly the meaning of that word "gentlewoman"?

A. I don't recall.

Q. And the meaning of the phrase met with the approval of the assembly, and we put it in?

A. Yes, were all satisfied.

Q. Anyway, the particular wording of this certificate was approved by Miss Cronen?

A. It was approved.

Q. And a part of it was selected by her?

A. That is true.

Q. And when that was all done, the papers were signed, or you signed. Did you understand, Mr. Stevenson, what you were doing, and the contents of this paper when you signed it?

A. I did.

Q. And was it signed in the presence of Miss Cronen?

A. It was.

Q. Was she advised of its contents?

A. She was.

Q. And did you know what this release was before it was signed?

A. I did.

Q. Was it not dictated to your stenographer in the presence and hearing of Miss Cronen?

A. It was.

Q. And did she know—do you know whether she knew the character of it?

A. Oh, I think she did.

Q. How old a woman—is Miss Cronen a mature woman?

A. Yes.

Q. What has been her business or profession in life?

A. Professional nurse.

Q. For how many years, do you know?

A. I do not.

Q. And she is a keen, bright, shrewd woman, is she not?

A. She is. She is a bright woman.

Q. From your professional relations in this case, are you prepared to say she usually understands exactly what she is about?

A. I think so.

Q. Now, was this stipulation and this release deposited in escrow at the same time as the other papers?

A. It was.

Cross Examination.

Questions by Mr. NOLAN:

Mr. Stevenson, what time of day was it that Miss Cronen came to your office on the 24th of February?

A. The first time that day?

Q. Yes.

A. I don't—if the first time she came that day was when this case was adjusted, it was some time in the afternoon; whether she was there earlier that day, I do not know; don't recall. She may have been there in the morning, I don't know; don't remember now.

Q. Is that the time that she met with you and Mr. Logan and Mr. Clark to prepare these papers?

A. Pardon?

Q. Is that the time she met with you to prepare these papers?

A. Yes, sir.

Q. All these transactions took place at that time, at that one meeting?

A. As far as the preparing was concerned, yes.

Q. As far as the drawing of the papers, and the execution of them, it was all done at one sitting?

A. Yes, sir.

Q. And how long did that take?

A. Why, I should say an hour and a half, probably.

Q. Now, which of these particular exhibits were prepared at that time?

A. Well, all of the papers relating to Frank Allen and Margaret Gleason Moore were prepared at that time.

Q. That is the stipulation in regard to the Frank Moore—

A. Yes.

Q. (Continuing) Vindication, and the release from Mary E. Cronen. Is that mentioned in there?

A. You mean the last that I have reference to?

Q. Yes.

A. Yes, they were prepared at that time.

Q. And also one from Miles C. Moore?

A. No, there were none from Miles C. Moore.

Q. That wasn't prepared at that time. There was none prepared for him to sign at that time?

A. No, there was not, no, sir.

Q. Where was this—was this stipulation that you

entered into for the Walter Baker Moore case prepared at that time?

A. No; that was brought to the office by Mr. Clark.

Q. Was prepared by Mr. Clark?

A. Prepared by Mr. Clark and brought to the office.

Q. When was that prepared?

A. I don't know. I presume Mr. Clark—

Q. Was it before or after this meeting in the office?

A. It was before.

Q. It was before?

A. Yes, sir.

Q. Now, that is the stipulation which you entered into for the dismissal of the case?

A. Yes.

Q. Mr. Clark brought it with him that day, did he?

A. Yes, sir; that is my best recollection.

Q. When was this escrow agreement to the bank prepared?

A. He brought that with him also.

Q. That was brought with him, and what other papers did he bring with him?

A. He brought with him the release of Miss Cronen, release of Walter Baker Moore.

Q. And the escrow agreement?

A. And the escrow agreement.

Q. Are those the only two papers he brought?

A. Well, he brought the escrow agreement, the

release—

Q. And the stipulation?

A. (Continuing) And the stipulation.

Q. Mr. Clark had those prepared when he came over that day?

A. Yes, sir.

Q. Then the only papers prepared in your office at that time were the releases to be signed by Frank Allan Moore and his wife?

A. Yes, the stipulation.

Q. And the agreement, or release signed by Mary E. Cronen—where was that prepared?

A. You mean of Frank Allan and Margaret Gleason Moore?

Q. No. The release which Miss Cronen executed. Where was that prepared?

A. To Frank Allan Moore and his wife?

Q. No.

A. You mean the release of Walter Baker Moore?

Q. Yes.

A. That was prepared by Mr. Clark.

Q. That was prepared by Mr. Clark?

A. And brought to the office, yes, sir.

Q. When was the form of that agreed upon?

A. Well, the form was finally agreed upon at the meeting that day, in Mr. Logan and my office.

Q. But prior to that time—well, who prepared that release? Did you prepare it?

A. No, Mr. Clark, I assume did. He brought it with him.

Q. In your talk to that time, it was to be an affi-

davit, was it not?

A. Beg pardon?

Q. In your talk to that time, it was to be an affidavit, was it not?

A. Or release.

Q. Yes; in the form of an affidavit?

A. No.

Q. What was the reason of putting that endorsement on the bottom of it?

A. Are you talking—I am talking about the release, and you are talking about the certificate of good character, I think.

Q. Let's get back to the release. I am talking now about the release of Walter Baker Moore, the one he executed.

A. That was not a release, but a certificate of good character. That is what you have reference to?

Q. Yes.

A. I misunderstood what you referred to.

Q. It was agreed to be in the form of an affidavit, wasn't it, before this?

A. Well, I never understood it was to be an affidavit. We always referred to it in our negotiations as a declaration; declaration of Miss Cronen's good character. That is the way I styled it in speaking of it to Mr. Clark, a declaration of good character.

Q. How long had you been negotiating for the execution of that?

A. Oh, some considerable time. I wouldn't undertake to say. Three or four weeks, probably longer than that.

Q. Had you submitted forms to Mr. Clark for Mr. Moore to execute?

A. Yes, sir.

Q. And Mr. Clark had submitted forms to you?

A. Yes, submitted some to me.

Q. When did you first see the one that was finally executed?

A. The first time I—I think the first time I saw it was when Mr. Clark brought it to the office. I don't recall I ever saw it before.

Q. Miss Cronen had never seen it?

A. She had never seen it until that day, to my knowledge.

Q. And that endorsement was put on because of the objections she made to the form of it, was it not?

A. Well, if I recall now, I think Miss Cronen wanted some verification of the signature; some evidence, some additional proof that that was Mr. Moore's signature. Mr. Clark said he was familiar with it, and he would certify to it being his signature, and did so.

Q. Well, were all these papers prepared, that is, all the papers prepared and gone over before they were any of them executed, or were they prepared one at a time, piece-meal?

A. Well, I think they were all prepared, or all dictated, and the stenographer wrote them out, and brought them in, and we examined them and signed them, is my recollection.

Q. And what part did Miss Cronen take in that proceeding?

A. She consulted and advised with us.

Q. Did you read the papers aloud to her, or did she read them herself?

A. Well, I think—I believe I read the release aloud, if my memory serves me correctly.

Q. Which release?

A. The release she executed to Walter Moore. I know we discussed that, and I think Miss Cronen examined some of the papers.

Q. How about the one to Frank Moore?

A. Well, I don't remember now. I think, though, if I remember, Mr. Clark dictated to the stenographer in the room at the time. Whether she ever examined after that, or whether it was read again to her or not, I do not know.

Q. What did Miss Cronen do immediately after she executed these papers?

A. You mean that day?

Q. Yes. Did you all separate then?

A. I think so. I believe so.

Q. Now, what particular papers were left in your care at that time?

A. All the papers.

Q. All of them?

A. I think all of them; that is all the originals. Those intended for the escrow, I know were left with me. I think probably Mr. Clark took with him some copies. I am not clear whether he did or not. Maybe I supplied them the next day.

Q. You don't remember distinctly just what papers were left with you at that time?

A. My best recollection is, they were all left with me. It may be Mr. Clark took with him copies like copies of the stipulation, and copies of the escrow agreement. He may have taken those with him.

Q. Did he leave the release, or the certificate executed by Walter Baker Moore in your possession at that time?

A. Yes, sir.

Q. And also the statement executed by Miss Cronen?

A. Yes, they were left with me. All of the originals that went into the escrow were left with me.

Q. When was it you finally agreed to accept \$6,000 in place of the \$7500?

A. Well, that was some time before these papers were signed. I wouldn't undertake to say. The negotiations extended over quite a long period, several months from the time Mr. Clark came into the case, and I wouldn't be sure when we finally agreed upon that sum. It was some time, though.

Q. This was on the 24th day of February, in the afternoon, that you all met in your office, as I understand?

A. Yes, that is correct.

Q. How long did you keep these papers that were left with you?

A. Until the next morning.

Q. What time?

A. The next day at noon; I think at noon. I believe it was noon, or anyhow not the forenoon. Mr. Clark phoned me that he had the money, and for me

to meet him at the bank. I went to the bank and met him.

Q. And then you went over to the bank and deposited with Mr. Clark?

A. No, deposited with Major Jubitz of the Security Savings and Trust Company.

Q. How, does it come, Mr. Stevenson, that nothing was mentioned in that escrow agreement in regard to the release which she executed in favor of Frank Moore?

A. What agreement do you mean?

Q. The release which she executed in favor of Frank Moore? How does it come that was not mentioned in your escrow contract?

A. Well, you see, we made practically two escrows. One embraced all the papers having application to the Walter Baker Moore case under one escrow direction or stipulation, and then the papers referring to Frank Allan Moore and Margaret Gleason Moore are mentioned in the stipulation respecting those two parties, and they were all put in together, but in the stipulation as to Walter Baker Moore, there is no mention of the other Moores at all. But they are mentioned—the other Moores are mentioned in the stipulation. There were two stipulations.

Mr. CLARK: You mean two instructions to escrow?

A. Yes.

Q. Did you have two escrow agreements with the bank, as I understand you?

A. Yes, that is correct.

Q. There was only one produced here?

A. No.

COURT: There have been two produced.

Mr. CLARK: The one I handed you over there is the second one.

A. The one you examined last, Mr. Nolan, is the second escrow agreement.

Mr. CLARK: Here is the second one.

Mr. NOLAN: But to the bank.

Mr. CLARK: That was deposited with the bank, with instructions to escrow.

Mr. NOLAN: The escrow agreement, and the only one I see, is addressed to the Security Savings and Trust Company, and it states "There is this day deposited with you the following papers: (1) Stipulation for dismissal of the case of Mary E. Cronen, vs. Walter Baker Moore, now pending in the United States Court for the District of Oregon; (2) Release and discharge of Walter Baker Moore of all claims and demands of whatsoever nature signed by Mary E. Cronen; (3) Statement signed by Walter Baker Moore, certifying, among other things of the high moral character of Miss Cronen."

Mr. CLARK: If you will read the paper just underneath that, you will see the other stipulation.

Mr. NOLAN: Yes, but this one is addressed to the bank. Was this addressed to the bank also?

Mr. CLARK: It was delivered to Mr. Jubitz, with instructions.

A. It went in, Mr. Nolan, with the other papers.

Q. It is not mentioned anywhere in the instruc-

tions to the bank?

A. No, it was not mentioned in the general letter of instructions on the Walter Baker Moore case. It is not mentioned. That was agreed upon afterwards. That is, the form of it was agreed to later.

Q. Now, something was said at the time of this meeting in regard to a statement to be signed by Miles C. Moore, wasn't there?

A. Yes, that subject came up.

Q. Was something prepared in connection with that?

A. No, nothing prepared. Miss Cronen, as I recall it, wanted a statement of a like nature from Miles C. Moore, and Mr. Clark said that Miles C. Moore was about to leave for China, and that he couldn't get into communication with him; couldn't get him to sign. And Miss Cronen waived the stipulation at that time as to Miles C. Moore.

Q. When was that to be executed?

A. Which? You mean the statements of the other Moores?

Q. By Miles C. Moore.

A. Well, it was not to be executed at all by Miles C. Moore; only as to the other two Moores, Frank Allan and Margaret Gleason Moore.

Q. Now, at the time you separated, Mr. Clark took with him the blank statements which were to be executed by Frank Allan Moore and Margaret Gleason Moore, did he not?

A. No, they were not—those statements were not prepared in the office, but the form is prepared in the

agreement which you just had.

Q. He prepared these some other time?

A. I presume he prepared these later, yes.

Q. Now, when were those to be delivered?

A. Well, there seems to be a difference of opinion about that. Miss Cronen evidently had the opinion they were to be delivered at once.

Q. What was said about it?

A. Well, the only conversation I can recall now was this: I think Miss Cronen asked Mr. Clark how soon he could have back here the statements by Frank Allan and Margaret Gleason Moore, and I don't pretend to remember the dialogue, but what I gained from it was merely a matter of sending up there for the statements.

Q. Up where?

A. Up to Walla Walla. And that they would come right back. That is, the understanding I gained from it was, there would be no difficulty involved, or no delay, in getting these statements here, getting them signed, but whether there was any exact agreement between us as to just when they would be delivered here, my memory isn't clear.

Q. Then Miss Cronen had no knowledge as to what was to be in these statements, as I understand?

A. Oh, yes, they were agreed upon in the stipulation.

COURT: I understand the statement is set out in this stipulation—the form of it.

Q. And you are quite sure Miss Cronen went over very carefully the two releases which she signed?

A. Well, I don't know. You mean the two releases?

Q. Yes.

A. Yes. The release to Walter Baker Moore she read over, or I read to her, I don't recall which. The other release was dictated in her presence.

Q. What construction was placed upon that release to Walter Baker Moore, as to whom it should release?

A. I recall Miss Cronen was fearful that the scope was too large, that it would probably release the other members of the family.

Q. What did Mr. Clark say as to that?

A. Mr. Clark took the same view we did. It would merely release Mr. Moore and his immediate descendants, his heirs and representatives in the descending line.

Mr. CLARK: We don't claim anything else now.

Q. Miss Cronen made some serious objection to the execution of it, did she not, on account of the form of it, outside of what you have spoken of?

A. I don't recall it now, Mr. Nolan. That objection—any objection as to form. The objection went more as to substance.

Q. As to the wording of the release. She made serious objection or made serious objection that it didn't specify anything about a vindication?

A. She may have objected to that. I don't recall at this moment. Possibly she did. I believe if any objection was there, it was met by the statement that the vindication stood by itself, and was a separate

statement, but I cannot recall anything on that.

Q. Did she instruct you to go down and deposit this in escrow, Mr. Stevenson?

A. You mean by specific instructions?

Q. Yes.

A. No.

Q. You just presumed it was all right?

A. That is it.

Redirect Examination.

Q. When these papers were signed, Mr. Stevenson, in your office, they were signed upon the distinct understanding that they were to go in escrow?

A. I so understood it, yes, sir. That was my understanding.

Q. Wasn't that discussed?

A. Yes.

Q. We agreed upon the escrow, didn't we?

A. It was generally understood that they were to go in escrow in the bank.

Q. And we canvassed whether we would put them in the Security Savings and Trust Company, or somewhere else. Do you remember the Portland Trust Company was mentioned?

A. I don't recall that. I remember it was finally agreed upon, the Security Savings and Trust Company. I don't remember.

Q. Do you remember when the papers were left with you, I said to Miss Cronen and yourself that I was perfectly willing to leave them all with you gentlemen?

A. Yes.

Q. Until I got the money?

A. Yes.

Q. At which time they were to go in the bank?

A. Yes, sir.

Q. Miss Cronen was there when that statement was made?

A. I believe she was.

Q. Now, you say you never saw the certificate of good moral character signed by Walter Baker Moore, until it was produced at the time the settlement was agreed upon? You mean that particular statement?

A. Yes, in the form—

Q. The fact is, it was, except written on different paper, exactly the form which you had OK-d, and which we had read over?

A. What I had reference to was the statement as signed.

Q. As signed?

A. Yes, sir.

Q. But the substance and language and form you had previously approved?

A. Yes, sir, I had.

Q. After consultation with and receiving the consent of your client to do so?

A. Yes, sir.

Q. There was to be no release, or I mean no vindication or declaration signed by Governor Moore—Miles C. Moore? That was discussed at the time, and waived?

A. It was waived, yes.

Q. And do you remember Miss Cronen saying at the time, "Well, I haven't anything against the Governor anyway. I don't care anything about it"?

A. Said something to that effect.

Q. With respect to the statement to be signed by Frank Allan Moore and his wife, you were subsequently advised that such a statement had been signed, and was ready for delivery?

A. Yes, yes.

Q. And that was after Miss Cronen had notified the bank that she wouldn't be bound by the escrow any longer?

A. My recollection is, it was subsequent to that time.

Q. Didn't want anything more to do with the matter, and you have understood ever since that we had the statement ready to make delivery of?

A. I believe you told me.

Q. And I have here today, and have had it since the 18th or 19th day of May, 1912, signed and witnessed, and everything just as called for.

Recross Examination.

Q. With the permission of the Court—there was something said at that meeting, some understanding, was there not, to the effect that this statement signed by Walter Baker Moore, and those to be signed by Frank Allan Moore and Margaret Gleason Moore, were to be placed of record in Multnomah County, was there not?

A. No, I think there was no understanding as to

that at that meeting.

Q. You never heard that discussed?

A. Yes, I have discussed that myself, with Miss Cronen, but nothing was said about it at that time; didn't in any way form a part of that agreement.

Q. Are you quite positive, Mr. Stevenson, about that.

A. I am reasonably positive; I have no recollection of it. The matter was entirely optional with Miss Cronen as to whether she wanted to make it of record, or not, and a matter the other side couldn't regulate or control, anyhow, and as far as I was concerned, there would have been no occasion to bring it up. It would have been our own arrangement afterwards.

Redirect Examination.

Q. Just one more question I forgot, with the permission of your Honor. You said a few moments ago that you didn't recall whether there was any talk or agreement with respect to the time when the statement from Frank and his wife was to be back; that is, to be back in Portland; the agreement was just as put down in writing, was it not? That that statement of Frank's, when it came here, was to go into the bank, or was to be delivered to you when the Walter Baker Moore matter was also closed up?

A. I am not prepared to say that was the exact understanding. There was a sort of feeling among us that the whole matter would be adjusted a great deal sooner than it was, and I am not prepared to say that

it was understood positively among us that this was—that the Frank Allan Moore feature of it was to await the consummation of the other settlement. My understanding was, in a general way, that any time the statement of Frank Allan Moore and Margaret Gleason Moore came here, they might be exchanged for this other, but I don't know there was any positive agreement on the last.

Q. Did you read what you signed here, and what was dictated in your presence before you signed it?

A. I probably did.

Q. Doesn't that provide all to be delivered at the same time?

A. Let me see. It was a long time ago.

Q. Just refresh your memory. Isn't this a fact: That Miss Cronen was extremely insistent that under no circumstances was the release of Frank Moore and his wife and Governor Moore to be delivered to me until she got the additional \$3,000.00?

A. Well, I suppose that was evidently. She wanted to hold them until the whole thing was settled; in other words, she didn't want to release anybody—

Q. Exactly; anybody, until she had got the additional \$3,000?

A. The general idea I had, they were trying to wind up all these cases together.

Q. Yes; and the time to wind it up was left fixed at 90 days?

A. As to the Walter Baker Moore. I am not so clear as to the others. No, there was some talk at the time as to how soon we could get these statements

back. That is the only thing that leads me to think there might be a sort of feeling that this phase of it could be concluded sooner. But I wouldn't say any positive meetings of minds upon that point.

Q. After reading the agreement, what do you say?

A. My view is unchanged.

Q. Unchanged?

A. Yes. It don't say in positive statement these papers to be delivered at the same time.

Q. Perhaps I mis-read it.

A. Maybe I did; it is possible I did.

Q. You will notice here that this statement when returned was to be delivered to the Security Savings and Trust Company?

A. Yes.

Q. If that was to be delivered, and the matter closed up as soon as the statement arrived, why did it go into escrow in connection with the other papers when it came here? Do you remember that?

A. Well, I want to make myself clear on that point. As far as my views went, if they are permissible here, I don't know that there was anything said between us at the time. But your side of the case would hold this statement until the expiration of the 90 days.

Q. That was distinctly understood.

A. I won't say distinctly understood. I say my mind is not clear upon that point.

Q. It says here: "The release herein referred to is to be delivered to A. E. Clark, and the written

statement aforesaid, to the aforesaid attorneys for Mary E. Cronen when said sum of \$3,000 is paid, and upon failure to make such payment", the \$3,000, the release of Frank Moore and his wife and Miles Moore, according to this, was to go back to you for Miss Cronen?

A. Yes.

Q. In other words, don't you remember that the talk there that day was, upon the part of yourself and Miss Cronen, that you didn't propose to deliver to me any release of any of the Moores until you got the second \$3,000, and it was put in that stipulation in that form? Do you remember that?

A. Yes, that was the general view of it.

Witness excused.

JOHN F. LOGAN, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. CLARK:

Mr. Logan, you are engaged in the practice of law in this city?

A. I am.

Q. Have been for the last some years?

A. 20 years.

Q. 20 years. And you have been for three or four years associated in the practice of law with Mr. John H. Stevenson, who just left the stand?

A. I have been.

Q. You, I believe, and Mr. Stevenson, were at-

torneys of record for Mary E. Cronen in the breach of promise case she brought against Walter Baker Moore?

A. We were.

Q. And so continued up to—you are yet, are you not, as far as the records show?

A. We are.

Q. Did you receive any notice of dismissal or withdrawal of your authority to represent her, until after February, 1912?

A. No.

Q. The first notice of that character was in July of this year, was it not?

A. I think during the month of July.

Q. July 15th, according to the records of the court? Now, I, you understand, was, at the time attorney of record for the defendant in that latter case?

A. Yes.

Q. The negotiations for settlement of this case, this later case, covered about what period, Mr. Logan?

A. Oh, they covered a period from about one hour after the summons was served on the defendant; I got a telephone communication from Senator Brownell, I believe, within an hour after the papers were served.

Q. That is before my retention?

A. The next day I received a visit from Mr. Edgar Piper, editor of the Oregonian, a friend of Governor Moore, looking to a settlement.

Q. And negotiations continued in progress from then until settlement was effected?

A. They continued right down with no definite results until—

Q. We had—upon the one hand with respect to the amount to be paid, we had offered you amounts ranging from \$2500 to \$3500 for many months?

A. Yes.

Q. And you gentlemen were claiming a right to recover a considerably larger sum; I don't remember how much, but I think at first blush you thought the damages were large?

A. We did.

Q. And finally, in the course of the negotiations, you reached what I think you called your irreducible minimum?

A. Yes, I said the irreducible minimum was \$7500, if I remember rightly. And you said that your unincreasable maximum was something like \$3500.

Q. Yes, and there seemed to be a hiatus there that could not be bridged.

A. We both threw aside the contradiction in terms, and came to an agreement.

Q. But as a matter of fact, it took us a great many months to get together on the amount?

A. We negotiated—I remember I returned from San Francisco some time during the month of February, about the 13th or 14th of February. We came to an agreement just about that time.

Q. That was the first time we had come to an agreement, really, upon the amount?

A. I had been away from Portland during the first half of February, and we came to an agreement

about the 15th of February. I will say right here that Miss Cronen never haggled about the money any of the time. The amount of money didn't concern her at all. She always maintained that that was secondary.

Q. Why was this irreducible minimum?

A. That was the interest the attorneys had in the case; all through this matter where the matter of \$5,000 was to be paid over, and all that, that was the extraordinary interest that the contingent fee had to do with the case. Miss Cronen never at any time considered the money as the important factor.

Q. Do you remember when the settlement was finally agreed upon?

A. The settlement was finally agreed upon—we were backing and filling quite a deal. I remember we came practically to a settlement in your office one time, when Mr. Lee was present.

Q. I am speaking now of the 24th of February, 1912.

A. Well, about a week before that, we came to an agreement. The trouble then was upon the form of the paper that Mr. Walter Moore was to sign. I believe Walter Moore was in San Francisco, and it had to be forwarded to him at the time, and you were in telegraphic communication with him. The controversy about this business of the property arose when the form was submitted, verbally, I think to you and to Mr. Lee, in your office, when Miss Cronen, through me, insisted that the certificate that was to be signed was—with reference to her character, and that was—

all her actions were made with an eye single to that, that it would be from him and his family, and Mr. Lee refused to allow the certificate to come from—

Q. Do you remember about when you came back from Frisco?

A. Why, I got back about two days after you did, Judge, about the 15th of February.

Q. 15th of February?

A. I remember that Judge Bean and I were talking about coming together from San Francisco, and I think I came two days later than he did. I went to visit my mother in Oakland.

Q. Aren't you in error about discussing that in my office?

A. I remember that distinctly.

Q. Because my correspondence shows that the form which was actually signed as prepared by Mr. Stevenson, was mailed to me from San Francisco on the 16th day of February.

A. Well, I probably got back a little earlier then.

Q. And it had been—now, just refresh your memory.

A. I know there was a delay while I went down there, and we never finally came to a conclusion until after I got back. I remember distinctly. We were offering and counter-offering for months beforehand. The thing that brought it,—the records of that court will show—the thing that brought it to an issue was the fact that the case was coming to trial right here in this courtroom some time in February.

Q. What time did you leave for Frisco?

A. I think I left about the very first of February, or the last day of January.

Q. Then, isn't it true that before you left for Frisco at all, the form had been agreed upon?

A. I think the settlement had been agreed upon.

Q. And the form?

A. That I don't remember.

Q. Just refresh your memory. I see from my correspondence that the form that was finally agreed upon was received—was transmitten to Frisco under date of February 5th.

A. The matter of forms in these things was left to Mr. Stevenson. I know there was no definite agreement at settlement until after I got back.

Q. And that the delay then came because Mr. Moore sent back a different form, which, when returned here, wasn't satisfactory, and we finally got him to sign the form which had been approved prior to the 5th of February.

A. Yes, the delay was on account of the form, you know. There was never any trouble about the money. Miss Cronen never complained. It was always we lawyers that were making trouble about the money.

Q. Well, I didn't gather that from what you lawyers used to tell me, but of course you didn't care to disclose your motives at that time. Well, we got down to the 24th, anyway. How did I happen to come over to your office that day?

A. I don't know; to get that case settled before the trial. That is what brought you over.

Q. How did I know that you and your client were there waiting for a settlement?

A. I haven't a bit of doubt Mr. Stevenson sent for you.

Q. You sent for me?

A. Mr. Stevenson. Mr. Stevenson was carrying on my work.

Q. Now, were you there during the course of the negotiation?

A. I was.

Q. Did you look over the papers?

A. I did.

Q. Did you familiarize yourself with the scope and character of them?

A. I did.

Q. Did you understand them?

A. Yes.

Q. In whose room did the negotiations which finally culminated in the signing of these papers occur?

A. Mr. Stevenson's.

Q. Who were present?

A. Mr. Stevenson, Miss Cronen, yourself and myself, and part of the time the stenographer.

Q. And how far did Miss Cronen sit from where Mr. Stevenson sat?

A. Oh, they all sat around the table.

Q. They all sat around the table within a few feet of each other?

A. Yes, sir.

Q. The room—we all sat in one end of the room, did we not?

A. Yes; either one of us could touch each other at any time from where we sat.

Q. I was the only one being touched that day.

A. I don't know about that.

Q. However that may be—

A. I will say I don't think that the young lady got one cent more than she was entitled to.

Q. I don't say she did, but she got all she was entitled to, as you thought?

A. No, I don't think that.

Q. We were all there within easy hearing distance of one another?

A. Yes, yes.

Q. Now, you remember that there was some discussion with respect to the scope of the release of Walter Baker Moore?

A. Quite a deal. Miss Cronen was very suspicious.

Q. You took part in the discussion?

A. I did.

Q. Miss Cronen was very suspicious?

A. Very suspicious indeed.

Q. She was exceedingly anxious to know everything that was going on?

A. She was.

Q. And exceedingly anxious she should understand everything?

A. She was.

Q. And she insisted on going into everything carefully?

A. She did.

Q. And understanding all the terms of everything that was put in any of the papers?

A. She did, very intelligently.

Q. She is an intelligent woman, isn't she?

A. I have seldom met in all my experience a more bright, intelligent woman than Miss Cronen is. I don't know of any; with all the brilliancy of her ancestry.

Q. From your experience in dealing with women clients, conducting business in professional transactions, you are of the opinion, are you not, that Miss Cronen understood exactly what was going on that day, as fully as possible for any person to understand?

A. Except one particular later on.

Q. I mean with respect to what was in the paper.

A. With respect to the settlement with Walter Moore, it was absolute.

Q. Absolute.

A. After we had explained the question about heirs and assigns.

Q. She herself brought up, when that release was read, the question whether that released anybody but Walter Baker Moore?

A. That was brought up; I infer was brought up by her.

Q. And you took part in the discussion, and we finally concluded, did we not, it didn't release any of his collateral relatives or his ancestors?

A. Remarkable unanimity of judicial opinion.

Q. Did you read over the escrow agreement, that is, the instructions to the escrow in the Walter Baker

Moore case?

A. I did.

Q. You understood them?

A. I understood them.

Q. And was Miss Cronen made acquainted with them?

A. Yes, she was.

Q. And also you remember that certificate which Walter signed?

A. Yes.

Q. You know, I suppose, that was produced in the form that had been approved by Mr. Stevenson?

A. I think it was.

Q. And do you remember how the question arose which was the occasion of my certifying to Walter's signature?

A. Well, everything went as smooth as a marriage day until Mr. Lee refused to have the family sign, and then Miss Cronen immediately became suspicious, and she insisted, if I may go on, she insisted that there was something wrong that the family would not sign. She was suspicious of Lee, and she was suspicious there was something wrong, and she wanted a certificate from the family, because the family had been the cause, as she claimed, of the trouble. And on that day, when that certificate came from Walter Moore, while she was familiar with his signature, she wanted to be sure that it was. She wanted assurance from you, for the reason that Lee had procured it, she said, and she would accept your statement, and she wanted your assurance that it was his.

Q. So I certified it?

A. And you certified it, and then and there she again bethought herself that she wanted the family, and right then and there she insisted that the family should take part in it to the extent that Governor Moore should, with Frank Allan Moore and his wife—she being just as much a party as Frank Moore.

Q. It was on this point, in the course of the negotiations, that the question was brought up about the other members of the family?

A. Well, the young lady always wanted that.

Q. Why was it that your office, if that was the case, that your office prepared and submitted to me, and had me procure from Walter Baker Moore the certificate from him alone? Where is the blame?

A. I don't think any blame except this: We lawyers looked at it from the money side, and she from the sentimental side. We looked at it from the sordid financial side, she from the sentimental side.

Q. The point is, didn't I procure—

A. Any criticism I make now is just as much to us as you. I don't say you were to blame. I say we were looking at the money end and settlement of the case, and the young lady was looking after the sentimental end of the question on her part. I have learned a lesson in this case, if I may inject here, we should have looked at the other side, and further, we should have taken her instructions in writing. I have learned that lesson in dealing with women.

Q. That wasn't up to me. She was your client and not mine. However, she was the one who want-

ed that certificate by me put on the declaration signed by Walter Baker Moore.

A. Yes.

Q. It was put on there at her request?

A. Yes.

Q. Now, after that was all done, this question came up about the signing of a declaration by other members of the Moore family?

A. She wanted Governor Moore, Frank Moore and his wife.

Q. And finally it was agreed that a declaration should be signed by Frank Moore and his wife?

A. Frank Moore and his wife.

Q. I stated at that time, did I not, that I understood that the Governor was in Frisco, about to go to Honolulu or the Orient?

A. Yes, sir.

Q. And whether or not he would be back within the 90 days when the three thousand was to be paid, I didn't know. So, do you remember Miss Cronen saying she didn't care anything about the Governor anyway. She had nothing against him, and that was waived?

A. Yes, she said, she said very freely, "I haven't really anything against the Governor. I want the family. He is part of the family, and I want his name with it. I haven't anything personally against the Governor. The Governor and I could get along, if it wasn't for some other things."

Q. And it was agreed the Governor's signature should be waived?

A. She waived the Governor.

Q. Do you recall the form in which the certificate of Frank and his wife was to be signed?

A. I remember the form.

Q. Do you remember the discussion as to the particular language to be used?

A. I remember that.

Q. The use of the word "gentle woman"?

A. I took great interest in that.

Q. And you and she discussed just what the scope of that was? She wanted that in, and you wanted that in?

A. I did.

Q. And it was put in?

A. It was put in; no question about that.

Q. No question about that, and there is no question, either, is there, but you and Mr. Stevenson and Miss Cronen fully understood everything that was put in the papers with respect to Frank Moore and his wife and the Governor?

A. Oh, yes.

Q. No question about it?

A. I would be much surprised if anybody said any one of us didn't understand.

Q. So that the whole agreement between the parties was put in writing, finished up in that way?

A. Yes.

Q. Do you remember when all the papers were signed, they were left there in your office?

A. Yes.

Q. Because I didn't happen to have the \$3,000

with me.

A. I think so. A good deal of this detail, Mr. Clark, was left to Mr. Stevenson. I considered, let me say here, I considered I was in this case as advisory counsel. Mr. Stevenson was acting. The way the case came to the office, I understood it that way, and never understood it any different until after the case was settled.

Q. Did you understand all the papers that were to go in escrow?

A. Oh, yes.

Q. No question about that. Your office never—your office was authorized by your client to take these over and put them in escrow?

A. Authorized right there. The papers spoke for themselves.

Q. And that authority was never revoked?

A. Never revoked, no.

Q. And you recall that Mr. Stevenson did put the papers in escrow? You know that, as a matter of fact of office history?

A. As a matter of fact of office history.

Q. And your office was paid on account of Miss Cronen, the sum of \$3,000?

A. It was.

Q. It was, of course, accounted for to Miss Cronen?

A. Was accounted for between Miss Cronen and the office.

Q. And as far as you know, that has been retained?

A. The part that came to me has been retained, I assure you upon that.

Q. And as far as you know, Miss Cronen has retained what she received?

A. Yes.

Q. Mr. Logan, did you know, before the notice was served on the Security Savings and Trust Company, that Miss Cronen was to serve a notice rescinding, or attempting to rescind the escrow agreement in April, 1912?

A. Yes, I think I did.

Q. Before it was rescinded?

A. I think I did, yes.

Q. Did you prepare the notice of rescission?

A. I did not.

Q. Do you know who prepared it?

A. I do not.

Q. Through whom did you get the advice that such a rescission was going to be made?

A. From Miss Cronen herself. She complained that the acquittance or certificate from Frank A. Moore and his wife had not been forwarded in the time that she had agreed to.

Q. Was it your understanding at the time that we were to receive the release of Frank Moore and his wife and Governor Moore before we had paid the additional \$3,000?

A. Well, now, it wasn't my understanding that it was to be paid over, as a matter of contract, when it was turned over, but I can see now that Miss Cronen understood it that way.

Q. That is, you mean to say that it was her intention to turn over to us, or Frank Moore and his wife and the Governor, before we had paid her the additional \$3,000?

A. The way is this: it requires a little explanation,—I wasn't there all the time while this was being dictated, but this last stipulation with reference to Frank Allan Moore,—I had a notion that the \$3,000 was to have been paid much sooner than 90 days, but out of an abundance of caution, the 90 days was named, although you first wanted a longer time.

Q. Yes, I wanted 120 days.

A. Out of an abundance of caution, 90 days was named. Miss Cronen—and there again comes the matter of money that we were looking after, and the matter of sentiment and vindication of character she was looking after—she said to you, "Now, when can that be back?" And you said, in substance, about as soon as the mail can get back from Walla Walla, as you walked out of the room, because you said you were going away over to the Sound the next day or Monday. This was Saturday. She said, "I want to know when that will be back. I want to know. That is what I want", and you said two weeks that would be here, giving ample time for delayed mail.

Q. Then it was to go in—when it returned, it was to go into escrow in the Security Savings and Trust Company?

A. It was.

Q. And was to be delivered at the same time the money was?

A. It was.

Q. I gave it as my opinion we could get it back here in a couple of weeks?

A. You did.

Q. And that notwithstanding 90 days is fixed?

A. Yes, because she wasn't to get the vindication without the money. You could hold that vindication without the money.

Cross Examination.

Questions by Mr. NOLAN:

You heard Miss Cronen speak about the time when these certificates should come back from the Moore family?

A. Yes; yes, I heard that.

Q. Now, what were the exact words used in that connection, as you remember them?

A. Well, Miss Cronen all the time, she didn't pay a bit of attention to the money end of it. She was looking after the matter of vindication. She first insisted there should be a vindication from the Governor, and Mr. Clark said, "Why, Miss Cronen, I can't get this matter of Governor Moore back in 90 days". He wanted it back in 90 days; he wanted it all here. "Now, if you insist on having the vindication from Governor Moore, you will simply have to give me further time to get it, because I am not going to turn in the vindication without the money," and she was so insistent upon getting the vindication from Frank Moore and his wife, that she waived the Governor with the explanation, your explanation,

that in fact, she really had nothing against the Governor; that the Governor himself and she could get along if the Governor was let alone.

Q. This vindication from the Governor was to be returned anyway, but delivered to her?

A. No, it wasn't, because at the time, she was so anxious to get her certificate from the other people, that she wasn't going to wait for the Governor.

Q. Was anything said about these certificates going on record?

A. I will tell you about those certificates. The young lady wanted them on record. She spoke to me about getting them on the Miscellaneous Records of Multnomah County, and I believe we prepared a statement from Walter Moore, with the title of this court, so that it could be filed in this court; but some way or other, the other side would never sign over a vindication with the title of the court on it.

Mr. CLARK: Why, we did.

A. Until finally I came to Mr. Clark, and told Mr. Clark that is what I wanted, and Mr. Clark very agreeably said, "if we sign at all, I am not afraid of having it made public". He was very frank about it. I told him that was what we wanted; wanted to file it in this court. She was always after vindication. I frankly told Mr. Clark her purpose; we wanted to get it on the records here.

Q. When did Mr. Clark promise to have this vindication back from Frank Moore?

A. Mr. Clark never promised any definite time. He had two agencies to communicate with. He had

the agency of Mr. Walter Moore in Seattle, and Mr. Lee in Portland.

Q. When did the conversation about two weeks take place?

A. Right in Mr. Stevenson's room.

Q. This was after the meeting was over?

A. At the meeting.

Q. What?

A. At the meeting. As we were just closing the meeting, Miss Cronen was insisting all the time she wanted that down here in as quick a time as possible. We lawyers, I am satisfied, didn't give it the importance that she did, but I understood it was not to be given over until the money was paid over, and the money wasn't to be paid over until 90 days; it came with the money, although we understood the money would be here in a very short time.

Mr. CLARK: That is probably?

A. Yes, probably be here in a very short time. You would get the money, and it would probably be here in two weeks.

Q. When was the money deposited in escrow?

A. I don't know. Mr. Stevenson—you will notice they were all deposited by Mr. Stevenson. Mr. Stevenson did the active work. I was in the case in an advisory character, as I understood. The case didn't come to the office directly to me.

Q. Mr. Logan, do you know of any statement that was made in that meeting by any one, to mislead Miss Cronen in any way, as to what was being done, or as to what these papers contained?

A. Well, we are all wise after the event, and I can see now that Miss Cronen believed, and still believes that she was to get the certificate from Frank A. Moore and his wife and the whole case would be settled in two weeks. I am satisfied of that now. She believed at that time, but that was a matter that wasn't contractual and wasn't in the contract, and the attorneys didn't understand it that way. We had, if they wanted to force it, a right to keep all the matters until the 90 days. I see now, she understood it the other way.

Q. Miss Cronen didn't give any special authority for entering into this escrow agreement, outside of what is represented in that writing, as I understand?

A. Oh, Miss Cronen gave all the authority, of course.

Q. Just what is expressed in that writing is the authority she gave?

A. Yes, sir.

Q. She never told you outside of that to go down to make this escrow deposit?

A. She not only did it then, but she accepted the \$3,000 and divided it. Yes, there is no question about that.

Witness excused.

C. H. ABERCROMBIE, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows.

Direct Examination.

Questions by Mr. CLARK:

Mr. Abercrombie, you are an attorney in the courts

of Oregon?

A. I am.

Q. You are also counsel for the Security Savings and Trust Company?

A. I am.

Q. There have been introduced in evidence, Mr. Abercrombie, a number of papers, marked "Exhibits 1 to 6" inclusive. I will ask you to examine these papers and state whether or not these papers were deposited in escrow with the Security Savings and Trust Company along about the 24th of February, or within a day or two thereafter, and whether or not they were produced by the Security Savings and Trust Company, this morning, through you, as its agent or attorney?

A. They are, yes, sir. I can give you the exact date of the escrow, if you will hand me that case they came in.

Q. Case file, yes.

A. February 24th we received these papers as an escrow, and have held them ever since until I brought them over this morning.

Q. Do you remember, or do you know whether or not, at the time these papers were received in escrow, there was paid through your bank, to Mr. John H. Stevenson, the sum of \$3,000?

A. There was. The check was drawn to yourself.

Q. And do you remember that it came back endorsed over by me to Mr. Stevenson?

A. It did.

Q. And state whether or not that is the receipt that I gave you at that time for the money?

A. It is.

Mr. CLARK: This receipt is offered in evidence. Marked "Plaintiff's Exhibit 7".

"Portland, Ore. February 26, 1912.

Received of Security Savings and Trust Company
Walter B. Moore, through Security Savings and
Trust Company, Three Thousand Dollars.

A. E. Clark."

Q. Mr. Abercrombie, can you state whether or not, pursuant to the escrow, I caused to be deposited in behalf of Walter Baker Moore, the additional sum of \$3,000, with instructions to pay it over to Mr. Logan or Mr. Stevenson, as attorney for Mary E. Cronen?

A. You did, yes, sir.

Q. Do you remember about when that was paid in?

A. It was paid in on May 6th.

Q. 1912?

A. 1912.

Q. And it came to your bank in what form?

A. In the form of a check.

Q. Drawn by me?

A. Yourself.

Q. Has that money been retained there ever since?

A. It is there now, yes, sir.

Q. And subject to the order of Mr. Logan, Mr. Stevenson, or Miss Cronen, under the terms of the escrow?

A. Well, it would have been subject to their orders if it hadn't been for the letter signed by Miss Cronen.

Q. I mean, you have taken and held it under the escrow?

A. Yes, we have held it under the escrow.

Q. And did you bring that \$3,000 with you this morning, in the form of a draft?

A. I believe it is among the papers. Yes, I see it right there.

Mr. CLARK: I presume that while it is a little informal for me to make any tender in behalf of the Security Savings and Trust Company, I, representing the plaintiff; I think I am authorized, however, to say the Security Savings and Trust Company has, and now tenders into court the \$3,000 deposited with it under the escrow to be disposed of, pursuant to any order the Court may make. Am I right?

A. While made a party defendant in this case, we have made no appearance, and desire simply to get rid of this escrow.

Q. And the money is brought into court for that purpose?

A. That is the idea.

Mr. CLARK: It isn't endorsed, your Honor. The draft is made payable to themselves. It isn't endorsed, and I presume that it can be endorsed in accordance with the order of court, if the Court should make an order, in any way or to any person the Court shall direct.

COURT: Leave it in the custody of the clerk.

Mr. CLARK: Yes, we will leave it in the custody of the clerk, and the Court can make an order in any form it may see fit.

WITNESS: If the Court please, I should like a receipt.

COURT: Leave it deposited with the Court. The clerk is custodian.

Q. Just one more question. Along about the 4th of April of this year, state whether or not the Security Savings and Trust Company received a communication from Miss Cronen.

COURT: I believe you better return that draft. Leave it in Mr. Abercrombie's possession until the order is made, and then it can be deposited. He is the custodian of it and then it will be better for the bank. (Draft returned to Mr. Abercrombie.)

A. The Security Savings and Trust Company received a letter from Miss Cronen.

Q. Is that the letter?

A. That is the letter.

Mr. CLARK: I offer it in evidence.

COURT: That is the letter from Miss Cronen?

Mr. CLARK: Miss Cronen to the bank.

Marked "Plaintiff's Exhibit 8" and read as follows:

"Portland, Ore. April 4, 1912.
Security Savings and Trust Company,
Portland, Oregon.

Gentlemen:

You are hereby notified that I have rescinded any and all agreements heretofore made with Walter

Baker Moore, Frank Allan Moore, Margaret Gleason Moore, Miles C. Moore, or A. E. Clark, their attorney, in regard to the litigation between myself and Walter Baker Moore, and together with the escrow agreement between myself and said parties, or either of them, and which was deposited with you on or about the 27th of February, 1912, wherein you were to deliver certain papers executed by me, and certain papers executed by some of said parties, upon the payment of \$3,000 for my credit.

Said escrow agreement was obtained by fraud and deceit, and I will not be bound thereby. In case said escrow is delivered, I will be damaged in the sum of \$100,000, and I will hold you accountable therefor. You are therefore hereby notified not to deliver the said escrow to any of said parties, or to any one, or I will hold you for the said damages.

Yours very truly,

Mary E. Cronen."

Q. State whether or not you immediately transmitted to me a copy of that letter?

A. I believe we did.

Q. And state whether or not the Security Savings and Trust Company since that time has taken the position that it didn't care to make delivery of these papers to any one until the rights of the respective parties had been adjudicated?

A. That is the position we take.

Q. Did you have any further participation in the escrow?

A. Yes.

Q. I show you a paper and ask you if that is the check which you issued to me when the papers were deposited in escrow?

A. Yes, sir, that is the original cashier's check.

Q. And that check was returned and paid through your bank February 26th, paid through the clearing house, February 26, 1912?

A. That is right.

Q. And was returned through the clearing house with the endorsement upon it that now appears upon it?

A. Yes.

Mr. CLARK: The check is endorsed "Pay to J. H. Stevenson, or order. A. E. Clark. John H. Stevenson." We offer it in evidence.

Marked "Plaintiff's Exhibit 9".

WITNESS: I would like to get a receipt in particular for that cancelled check.

Cross Examination.

Questions by Mr. NOLAN:

These papers referred to by you as an escrow were received in your bank on the 26th day of February, 1912. Is that right?

A. The 24th.

Q. The receipt is dated February 26th. How do you account for that?

Mr. CLARK: They were in fact put in on the 26th, the day the check was given. I remember that.

A. The entry that we have—the custom is to enter the date the escrow is received as noted on the out-

side of the envelope, which here is February 24th. The money was evidently received on the 26th, as the receipt shows.

Q. This \$3,000 was paid on the same date that the escrow was received. Is that right.

A. Well, I couldn't say as to that.

Q. Well, it was about the date?

A. It was about.

Q. The money on this was paid on the 26th?

A. Yes, it was paid on the 26th.

Q. That was the date you received the escrow, was it not?

A. I presume it was, but I wouldn't swear to that, because the only evidence I have of the date of the receipt of the escrow is February 24th. The papers, however, probably speak for themselves, and it states that the \$3,000 is received at the time of the deposit of these papers in escrow. It is probably a statement of fact.

Q. How did that receipt come to be given? How does it come that it was signed by Mr. Clark?

A. We received a telegram from Mr. Moore which is attached to this receipt—

Mr. CLARK: Now, here, when I unpinned this, I thought it was one of mine. I thought that was it.

A. This is the telegram authorizing the Security Savings and Trust Company to pay Mr. A. E. Clark the sum of \$3,000 which we thereupon did, and took that receipt for it.

Q. Yes. These are the same thing. They both belong together, then.

A. Yes, this is the order to pay the money, and this is the receipt for the money. It should be pinned together.

Witness excused.

Proceedings herein adjourned until 2 P. M.

Portland, Ore., Wednesday, September 4, 1912, 2 P. M.

Mr. CLARK: I think all the papers relating to the several transactions have been introduced, and while this is a case brought by Walter Baker Moore only, to some extent it is dove-tailed in with the papers signed with respect to Frank and his wife and Governor Moore. I simply wish to say and have it spread on the record that we have here, and have had since the time prior to the expiration of the 90 day period, the certificate signed by Frank and his wife ready for delivery, of which fact Miss Cronen was notified, through her counsel, and it has been ready for delivery, and is ready for delivery, and we tender it in connection with the proceedings in this court, to be delivered in accordance with the stipulation of escrow. I think that is all we have to offer.

Plaintiff rests.

Mr. NOLAN: I wish to recall Mr. Stevenson.

JOHN H. STEVENSON, recalled by the defendant.

Direct Examination.

Questions by Mr. NOLAN:

Mr. Stevenson, have any certificates from Frank Moore, or Margaret Gleason Moore ever been ten-

dered to you for Miss Cronen?

A. Well, yes, I believe at or about—some time after the expiration of the 90 day period, Mr. Clark informed me that he had these certificates ready for delivery.

Q. That was after the 24th of May, 1912?

A. Yes.

Q. Not prior to that time?

A. No, not before that time.

Cross Examination.

Questions by Mr. CLARK:

Do you know whether I had informed your office, some time before, that we were ready to close up; that I had the certificates?

A. No, I don't know as to that.

Q. You don't know as to that?

A. No. I recalled that, about—some day or two—the date of it—I think it was on the day that the 90 day period expired, I called you up in reference to the matter, and you then asked me for three or four more days in which to procure the certificates, and I told you to go ahead and take the time, and my memory upon that point is—might be clearer. I know I reported the fact back to Miss Cronen that I had granted this extension of time, and she objected to my doing it, said it was unauthorized.

Q. Now, just to refresh your memory, wasn't that conversation probably about ten days before I told you I didn't know whether I could get it; that Frank was coming to town; and I got it before the time ex-

pired?

A. You showed me that afterwards, yes. I remember at that time, I have a very distinct recollection, you asked for additional time.

Q. You don't remember just when that was?

A. It was—the reason I am positive was because the time was about up, or up, and I wanted—

Q. My recollection is different about it, but then I can't argue with you now; but my recollection is, it was about ten days, and I wasn't sure whether I could get it or not, didn't I tell you, on account of Mrs. Frank having broken her arm?

A. Nothing was said to me about Mrs. Frank having broken her arm.

Q. It must have been Logan. That is all.

Witness excused.

MARY E. CRONEN, the defendant, being duly sworn in her own behalf, testified as follows.

Direct Examination.

Questions by Mr. NOLAN:

You are Mary E. Cronen, are you?

A. I am.

Q. The defendant on this case?

A. I am.

Q. You have heard the testimony of the witnesses of the plaintiff this morning?

A. Yes.

Q. Now, I would like to have you explain to the Court what conversation you had with Mr. Stevenson in regard to the escrow, and after it was deposited;

the first time you had any conversation with him after the deposit.

A. Well, the conversation I had with him was over the telephone.

Q. When was that?

A. Must I answer your question direct, or may I explain?

Q. Just explain to the Court what conversation you had with Mr. Stevenson after this alleged settlement. The first conversation you had with him after that time.

A. Well, I will have to go back several days before that, because I can't begin there.

Q. You talked with him soon after this alleged settlement, did you not?

A. Yes, I telephoned him, and left a message with Mr. Sam Johnson, his secretary, to hold those papers until I could get down to the office; there was something more I wanted to speak about that I had overlooked the other day, or didn't thoroughly understand. He said to come now, it must go to escrow.

Q. When was that you had this conversation with him?

A. Well, I understood it was the next day, but it must have been Monday morning, because the papers were signed Saturday, and the following day was Sunday, and I know the telephone was at his office, and he wouldn't have been in his office Sunday.

Q. Now, what did Clark say in that—at that meeting in regard to Miles C. Moore, as to a vindication from him?

A. Now, I shall have to explain that when I went to that office, we had haggled—I can't put it any other way than haggled—about the vindication for months. Mr. Clark said it was aside from the case, and my own attorneys told me it couldn't be handled legitimately, according to law. It was a woman's whim—all that sort of thing. I said as long as it was a woman's whim, and when agreed upon, it would hold—is that right? I have never been on the witness stand before.

COURT: Answer the counsel's questions.

Q. Was there any understanding about getting a certificate from Miles C. Moore?

A. There was.

Q. Yes?

A. No, I waived that, because Mr. Clark could not get that. He said Mr. Moore was on the way to the Orient. He was either about to sail, or he had sailed the day previous. He had every reason to believe Mr. Moore was on the way to the Orient at that time, and would not be back at the end of 90 days. I said, "I can't wait, I will take the other two".

Q. Do you know whether or not Mr. Moore was on the way to China?

A. I saw him a day or two afterwards at the Multnomah Hotel at dinner.

Q. So he was not on his way at that time?

A. No.

Q. Had you known that Mr. Moore was in the City or where he could have been reached, would you have entered into this stipulation?

A. No, I never would. I didn't think Mr. Moore's word counted for a great deal, but it was—I didn't feel any enmity against Mr. Moore, however, I had been misrepresented; it was his son, and it was a father's privilege to favor his son the way he had done.

Q. You heard the testimony about Mr. Clark's getting the statement about Frank Moore?

A. Mr. Clark and my own attorneys don't remember that but I remember that.

Q. Tell the court what Mr. Clark said in regard to that.

A. When it came to the discussion about having this here; when I found that that was not there in the office, I said we were not—that was the 24th day of February and the case was set for the 29th, and if they waited—they weren't sure they could get this, and I didn't want to run any risk of not getting that. I counted that above anything else in that statement, and Mr. Clark said no; he said he couldn't do that, or couldn't furnish that in sufficient time, or something; I don't know just how. I said, "Well, then, you understood all the time I intended to file defamation of character suits all along". I have wanted these people to settle all under one heading or I will file defamation of character cases." Mr. Clark said "Go ahead and file them". Then my own attorneys came in and persuaded me the thing could be arranged amicably, and it was at that time and that moment Mr. Clark said he could have them there by return mail.

Q. Now, would you have entered into this stipulation had he made any other promise to you?

A. I don't believe I would.

Q. Was there an understanding about having the certificates of vindication placed on record anywhere?

A. With my own attorneys we held it was my privilege to do it when I got them. That is why I wanted them in the form of an affidavit—must be properly attested.

Q. Was that talked over at this meeting?

A. Only this, that when Walter Baker Moore vindicating document was given to me, I refused to take it for the fact that it was not properly attested, and then Mr. Clark signified his willingness to identify the signature, and he assured me at the time "don't I know the signature" I said, "and know it very well after all these years, but that isn't the point."

Q. What was said at that meeting about their being recorded anywhere?

A. I don't know that we discussed it in the presence of Mr. Clark. I know it was well understood between me and my attorneys, that I might and I should put it on record, and should refer my friends to that.

Q. You don't know whether Mr. Clark understood it or not?

A. I don't know what took place between the attorneys. I know what took place between the three of us at that time in the office.

Q. Now, Miss Cronen, tell the Court what was to

be deposited in escrow.

A. Well, as I understood it, I understood that the release was the only thing to be deposited in escrow.

Q. Which release?

A. My release of Walter Baker Moore.

Q. And what was to become of the other papers which you signed?

A. I didn't know until this morning and they were shown in court, there ever were two papers in the escrow.

Q. What was to become of the paper signed by Walter Baker Moore?

A. It was to be given to me.

Q. At that time?

A. That is what I understood. I counted on that, and that is the thing that I called up Mr. Stevenson particularly for that morning, was to understand whether that was included in the escrow, because I hadn't understood it. I wanted that at that time.

Q. Would you have entered into this agreement if you had understood that was to be deposited in escrow?

A. No, I wouldn't have done it, because my whole ambition was to have that thing at that time. That was one of the valuable considerations at that time, or else it would have gone to trial.

Q. Now, there is testimony to the effect that you saw and went over the stipulation which was made with regard to Frank Moore.

A. Regarding Frank Moore, Frank Allan Moore?

Q. Yes, the stipulation the attorneys entered into

in regard to the vindication from Frank Moore and settlement with him. Was that drawn up in your presence?

A. That was drawn up in my presence.

Q. You saw it?

A. Yes.

Q. You understood its contents?

A. I understood its contents, and that it was to be turned over to them in a day or two, or, as Mr. Clark stated, by return mail. Those were the exact words, as I remember; and that release of Frank A. Moore and his wife, and Miles C. Moore was to be given to them just as soon as this came down, which was to be in a day or two, or return mail.

Q. How about the escrow agreement which has been introduced?

A. I never saw that. I never knew it existed until I saw it in the courtroom this morning.

Q. Was that drawn up in your presence at that meeting?

A. If it was, I don't know it.

Q. Did you see the stipulation which your attorneys entered into, in regard to the dismissal of the case you have against Walter Baker Moore?

A. You mean the release of him?

Q. No, the stipulation which they entered into?

A. Between the attorneys?

Q. Agreeing to release on its merits.

A. I don't understand the legal phrase. If you refer to the release of Walter Baker Moore, what we usually call that paper—

Q. That is Plaintiff's Exhibit 2.

A. No, I don't know anything about this at all.

Q. Was that drawn up in your presence at that meeting?

A. I don't know anything about it. I left that entirely with my attorneys, and I trusted them implicitly with everything.

Q. You are quite sure that never was read to you?

A. I don't know it if it was.

Q. Now, what papers did Mr. Clark have already prepared when he came to that meeting?

A. The declarations from Walter Baker Moore, and the release of Walter Baker Moore.

Q. That was the paper which Walter Baker Moore had signed, and which he certified to, and the one which you signed with regard to Walter Baker Moore?

A. Yes, sir.

Q. Mr. Clark had those were already prepared, and then he submitted them to you, did he?

A. Yes.

Q. You read them over?

A. Yes, and I objected to the reading of the top line saying that for \$6,000. I objected. I said, no, this isn't being settled for \$6,000. It is being settled for \$6,000 and these vindications. And they all said this was a minor matter. It wasn't a matter which should be put in a legal document, and didn't make much difference, and I ought to let it go at that. And I did.

Q. That is the reason you signed it, because they told you?

A. Well, I had an idea it was all right, and I just signed it.

Q. Now, what other papers were prepared and executed at that meeting other than what I have mentioned?

A. The release of Frank A. Moore and his wife, and the form of their vindicating affidavit. Now, when we read over Walter Baker Moore's affidavit "and my family", "for reasons peculiar to himself 'and my family' ", or "to myself and my family", the "my family" was left out. After they had been repeatedly returned, I said I simply wouldn't accept the thing, simply wouldn't accept it unless it contained that.

Q. Why did you execute it while that wasn't in it after it came back?

A. Well, I was just simply there, and I just did it. I was utterly disgusted as it was. The thing had been hanging then about a year.

Q. Now, what was the understanding as to what should become of these releases and various papers in case this additional \$3,000 should not be paid?

A. Should not be paid?

Q. Yes.

A. The papers were to be returned to me, and Mr. Clark specially stipulated in case, when I said to him—here is where I must explain—M. J. Lee sitting over there, followed me into the Portland Library about the 18th of February, and he proceeded

to intimidate me, as he had been employed to do for months, no, for years before, about these goods they had on me, and that goods they had on me, and another few things. And in the meantime, this thing was in progress. At any rate, when I mentioned the vindication, he said they will never give a vindication. Mr. Clark subsequently came to \$6,000, nothing else, and I said "the case will never be settled; that is all there is to that."

Q. Now, you have alleged in your answer, among other things, that you were to retain this \$3,000 which was paid, in case these certificates from Frank Allan Moore and Margaret Gleason Moore were not returned to you within the next day or two?

A. It was those things that Mr. Lee had told me that prompted me to ask Mr. Clark "what guarantee have I they will ever be signed? What guarantee have I that you will do the thing you promise?" He said the guarantee I have, aside from this here is \$3,000, if they refuse—if that contract isn't carried out.

Q. That is, Mr. Clark promised and agreed—

A. To refund that. It was in order to make me accept his promise that they would be there by return mail. He didn't say within two days, or anything of the kind.

Q. What was said about two weeks there?

A. That must have taken place out in the hall.

Q. Did you overhear that conversation?

A. I never overheard it.

Cross Examination.

Questions by Mr. CLARK:

Do you recall, Miss Cronen, the fact that the papers concerning Frank A. Moore and his wife, and the Governor were dictated in the office that day?

A. They were, but do you remember why they were dictated in the office that day?

Q. I have a very distinct recollection, but if you will answer my questions we will get along better.

A. I remember they were. I answered that I did.

Q. Do I understand you to say you understood those papers?

A. Just put that—

Q. Did I understand you to say awhile ago, in answer to Mr. Nolan that you understood those papers?

A. That I understood the release of these people? Yes.

Q. The Frank A. Moore papers that you heard dictated that day?

A. Yes, that I was to release him when they turned in those vindicating affidavits to you.

Q. Release Frank A. Moore?

A. Yes.

Q. And the other paper which contained the form of the vindication were both dictated in your presence?

A. Yes.

Q. And written out while you were there?

A. Yes.

Q. And afterwards brought back in the room where we were all sitting and signed up?

A. Yes.

Q. That is so, isn't it?

A. Yes.

Q. Now, you understood the papers that you heard dictated that day, didn't you? You understood what occurred?

A. Well, there were verbal provisions always on the—

Q. I am speaking now of papers. You understood the papers?

A. I understood.

Q. And you understood that we were putting our agreement in writing?

A. Yes. When I objected to certain forms, you kept saying "That isn't the law, that of course this is all form."

Q. Who were representing you that day?

A. You all there were—you all three said that isn't the law; this is a form.

Q. Who was your attorney?

A. Logan & Stevenson.

Q. They represented you?

A. Yes.

Q. I represented Walter Baker Moore?

A. Yes, sir.

Q. Now, we talked over the agreement first, then we put it in writing, didn't we?

A. Yes, sir.

Q. And do you remember the controversy, or

rather the discussion that day as to the form of the vindication?

A. Yes.

Q. That Frank and his wife should sign?

A. Yes.

Q. You indeed practically determined the phraseology of that, didn't you?

A. I did not.

Q. Who did?

A. Mr. Logan and Mr. Stevenson.

Q. Did you take any part in the discussion?

A. A week or two previous to that when Mr. Stevenson was in your office and you thought you had arrived at a settlement, I suddenly thought maybe he didn't remember that and maybe—

Q. Did you ever see me or talk with me at all, or meet me in my office at all until the afternoon of the 24th?

A. I never saw you.

Q. You never talked with me over the phone, or I never conversed or communicated with you, directly or indirectly, until I was introduced to you that afternoon?

A. Yes.

Q. Now, coming back to the day that we actually drew up these Frank A. Moore papers, you practically determined the form that was put in the agreement that day, didn't you?

A. It was determined by Mr. Logan and Mr. Stevenson.

Q. In consultation with you?

A. No, simply because it was a matter of form. When I insisted upon retraction, I insisted upon certain things that I must have retracted. They said, it won't do, it ain't the law.

Q. Who did?

A. My attorneys.

Q. Do you remember insisting that there should be put in there, that form, that she is a gentlewoman?

A. No, I didn't anything of the kind.

Q. You didn't have anything to do with that?

A. I didn't.

Q. Didn't you hear that at all in the discussion that day?

A. That is not—as that stands there it is not what was accepted that day.

Q. It is not what was accepted that day?

A. No, it is not.

Q. You mean to say that this agreement which Mr. Stevenson signed and which was dictated in your presence—

A. I don't know anything about whether he signed that or didn't. That thing as you read it this morning is not what we agreed upon in that office that day.

Q. That is not what you heard dictated that day?

A. No.

Q. It is not what you heard dictated that day at all?

A. No.

Q. Does it bear any resemblance to it?

A. It bears a very great resemblance, yes.

Q. Now, your idea is now that what was dictated and signed in the office that day in your presence is not what was produced in court?

A. That is not it.

Q. Then you mean to say that your attorneys substituted something which wasn't agreed upon, dictated or signed that day?

A. I have only my memory to serve me. Usually it is a very good memory.

Q. Now, what was there in those papers that were dictated that day which was not in the one produced?

A. I will tell you right away.

Q. When did you make the memorandum from which you are reading now?

A. That memorandum I have had in this book for a long time.

Q. When did you make it?

A. I made it somewhere along about last—I guess probably the 10th of last February.

Q. The 10th of last February?

A. When I decided on what would be the vindication.

Q. That is you made the memorandum which you are now reading on the 10th of February, or fourteen days before the settlement?

A. Yes.

Q. Read the memorandum.

A. I don't need to. It was simply the last clause in that—that they knew nothing about me which would detract from the character of a true gentlewo-

man. I didn't tell them to say I was a gentlewoman, but that they knew nothing about me that would detract from my character as a true gentlewoman. That is certainly what was signed in that office.

Q. Did they sign anything in the office that day?

A. It was the thing that was put up to me and that they were reading to me in that office. That is what I accepted.

Q. What other difference is there?

A. I don't remember any other difference.

Q. Then, outside of that difference which you say was not the form dictated, the paper in court is exactly what you heard dictated and read and signed in the office?

A. It is about that.

Q. You recognize or recall no other difference?

A. About that.

Q. You are sure now there is no other difference you recall?

A. I am not sure at all.

Q. You are not sure at all?

A. No, I am not. I can't be positive of anything.

Q. You are positive though that the form in this paper is not the form agreed upon?

A. Those last words, I remember very distinctly, is not the form agreed upon. I remember that very distinctly.

Q. That is the only difference you remember, is it?

A. That is the only difference that comes up to my mind as positive.

Q. Do you think of any that comes up to your mind, not positive?

A. No.

Q. How long were you in the office that day?

A. I don't know.

Q. About how long?

A. Well, I went there at one o'clock, and I suppose it was possibly half-past two when I left. I couldn't say positively.

Q. Possibly there a couple of hours. Several papers were dictated and written out while you were these?

A. Two of them that I know of. I don't know of any others.

Q. You remember signing the release of Walter Baker Moore?

A. Yes.

Q. You say you do not recall any escrow agreement?

A. With that paper?

Q. Or any other?

A. I do that that escrow, that release—

Q. I understood you to say that you do not recall any escrow agreement having been talked of, exhibited or signed that day.

A. You are mistaken, I didn't say that.

Q. What did you say?

A. I said I understood from my attorneys and from you that because the Moores couldn't furnish six thousand dollars at that time, that they wanted ninety days, and I said "Well, that will be all right. I don't

care about that; they can have all the time they want to, but my release must be kept until—

Q. Where was it to be kept?

A. In escrow in a bank. My release, not the vindicating document.

Q. Your release?

A. Only.

Q. And what was to be done with the release of Frank?

A. Why that was to be given to Frank by return mail when these vindicating affidavits were given to me.

Q. Now, do you recall that all the papers were left with your attorneys?

A. Yes.

Q. All of the papers?

A. Well, I can't say that because—

Q. (interrupting) Well, you understand—

A. (continuing) I understood until this morning that that release of Frank Moore was in your possession. I didn't know it was in the bank at all, and I tell you I don't know whether the escrow covered that paper at all. I understood all the time that was in your possession.

Q. And you never understood to the contrary until this morning?

A. That was the first I knew about it.

Q. And you never understood any of the Frank Moore papers were in escrow until this morning?

A. That was the first I knew about it. I never knew that.

Q. Do you recall writing a letter to the Security Trust & Savings Bank?

A. I remember distinctly I did.

Q. At that time you had no idea at all that any papers relating to Frank A. Moore were in escrow—or his wife or Miles?

A. I didn't know where they were.

Q. Now, wait a moment. Until this morning—

A. (interrupting) I don't know that they were in escrow.

Q. Until this morning?

A. Yes.

Q. You didn't have the slightest notion?

A. No. Now, don't think you will corner me there, because you will not, for I have experienced so much trickery since this case, that anything I write is going to give the information.

Q. I am glad I didn't represent you in the case. Until this morning now, you had not the slightest notion that the Frank Moore release or any of the papers relating to the Frank Moore matter were in escrow, and you supposed all the time that release was in my possession?

A. Yes.

Q. And you supposed that the only papers that were in escrow until this morning—

A. Yes.

Q. (continuing) was the release of Walter Baker Moore?

A. Yes.

Q. And you didn't discover to the contrary until

you came into court this morning?

A. Yes.

Q. Now, will you please tell me why on April 4th, all these things being true—

A. Yes.

Q. (continuing) that you wrote to the Security Trust & Savings Bank as follows: "You are hereby notified that I have rescinded any and all agreements heretofore made with Walter Baker Moore, Frank Allan Moore, Margaret Gleason Moore, Miles C. Moore, or A. E. Clark, their attorney, in regard to the litigation between myself and Walter Baker Moore, and together with the escrow agreement between myself and said parties or either of them, and which was deposited with you on or about the 27th day of February, 1912, wherein you were to deliver certain papers executed by me and certain papers executed by some of said parties upon the payment of three thousand dollars for my credit. Said escrow agreement was obtained by fraud and deceit and I will not be bound thereby." Now, if you didn't know until this morning, hadn't the slightest conception until this morning that any paper touching Margaret Gleason Moore, Frank Allan Moore, or Miles C. Moore were on deposit at that bank, or that any escrow agreement relating thereto had been made at the bank, why did you notify the bank touching those papers on April 4th?

A. It wasn't touching those papers. I wrote that myself and know just what was there. It was touching that release of Walter Baker Moore.

Q. Why didn't you say so?

A. It says so.

Q. Why did you say then "all agreement heretofore made with Walter Baker Moore, Frank Allan Moore, Margaret Gleason Moore, Miles C. Moore or A. E. Clark, their attorney, in regard to the litigation between myself and Walter Baker Moore, and together with the escrow agreement between myself and said parties."

A. Yes.

Q. "Said parties." That is Walter Baker—

A. (interrupting) Well, I don't pretend to —

Q. "And which was deposited with you on or about the 27th day of February, 1912, wherein you were to deliver certain papers—"

A. Yes.

Q. (continuing) to them and certain papers to me.

A. Yes.

Q. Now, why were you advising the bank that these agreements which the bank had nothing to do with and which you supposed all the time were in my possession until this morning, and concerning which you never knew there had been an escrow agreement—why were you notifying the bank you were rescinding those agreements and the escrow relating to them?

A. I wasn't rescinding the escrow—I was rescinding the escrow, in rescinding the agreement that I would deliver that release to Walter Baker Moore on the payment of that three thousand dollars.

Q. That is your only explanation is it of this matter?

A. That is the explanation I have.

Q. Did you write that yourself?

A. I wrote that myself.

Q. You are quite familiar with the legal forms of agreements and escrows, etc?

A. I ought to be after these years hanging around with this thing.

Q. You had in mind the whole situation when you wrote letters?

A. I had in mind that I had to cover the facts. There were agreements some place of Frank Allan Moore and Miles C. Moore. I was rescinding the agreements in that escrow in the bank. It was to prevent you and Mr. Stevenson from getting together and paying that three thousand dollars into the bank and taking out that release, when the whole settlement of the case depended, not on the six thousand dollars, but on the vindication of me by the Moore family.

Q. Now, you thought there was only one paper in escrow, that was your release?

A. Yes, but I didn't think that at that time because I knew—Mr. Stevenson had explained to me that the Walter Baker Moore vindicating affidavit was also there.

Q. What else was there?

A. I didn't know anything else.

Q. Now, you want the court to understand that up to this morning you knew nothing about any pa-

pers relating to Frank A. Moore being in that bank?

A. Yes.

Q. You want that understood.

A. That is as I understand it. I didn't know they were there.

Q. Were you present when this paper was dictated wherein it says that a release and acquittance, a duplicate original of which is hereto attached and signed by Miss Mary E. Cronen, is deposited in escrow with the Security Savings & Trust Company of Portland, Oregon, the duplicate original being your release of Frank, Margaret and Miles?

A. I don't know anything about that. I didn't know that was necessary.

Q. And "upon delivery to the said Security Savings & Trust Company of a written statement signed by Frank Allan Moore and Margaret Gleason Moore in the following form, for delivery to John H. Stevenson or John F. Logan" such and such was to be done. Now, you say that was to come back in two days?

A. By return mail.

Q. By return mail?

A. That was the only thing I intended.

Q. Were you there when this was dictated and written into the agreement: "The release herein referred to"—that is the release of Frank A. Moore and his wife and Miles—"is to be delivered to A. E. Clark"—having been previously deposited with the Trust Company—"and the written statement aforesaid"—that is your vindication—"to the aforesaid at-

torneys"—that is Logan and Stevenson—"for Mary E. Cronen when said sum of three thousand was paid"—that is the back sum of three thousand—"and upon the failure to make such payment" the release is to go back to the attorneys for you and the vindication is to come back to me.

A. I never knew such a document existed.

Q. Now, Miss Cronen, as a matter of fact, when you signed that release—just refresh your memory—these both were prepared in Mr. Logan and Mr. Stevenson's office, weren't they?

A. I know the documents were prepared; I know that release of Frank Moore was prepared; I don't know when this other was.

Q. When you signed, refreshing your memory, don't you remember, before you signed this release of Frank Moore and his wife and Miles, this stipulation was fastened to it, just as it is now?

A. Positively no.

Q. And you insisted it should be so fastened in order that there should be no question about the release which was identified in this stipulation?

A. No, I don't know any such a thing at all.

Q. Do you want this court to understand that the release your attorneys signed was not the release dictated in your presence?

A. I don't know anything about that. I was not paying attention to legal documents. I was paying attention to the thing I wanted and asked for for a full year. I wanted those vindicating affidavits in my hands and wanted them when I signed the re-

lease, and I supposed they were in the office and you told me you couldn't arrange it now suitable to the Moores, and at the same time suitable to me—

Q. Miss Cronen, if you were to get the vindication in your hand when the papers were signed, why didn't you get it then, instead of leaving all the papers with your attorneys to go into the bank?

A. That is what I wanted.

Q. You signed the papers that day?

A. I signed them that day.

Q. All the papers were signed and the matter closed?

A. Yes.

Q. Did you ask for the Walter Baker Moore vindication that day?

A. I asked for it—was it in the evening or the morning?

Q. I mean that—

A. That time?

Q. Yes.

A. Why, yes, I did.

Q. Then why, if that was the understanding, were all the papers put in an envelope and left with your attorney?

A. Well, the escrow—the release and anything that pertained to the escrow, whatever legal documents—

Q. I am speaking of the vindication. If you were to have that in your hand at that moment, why didn't you get it?

A. I simply left that to Mr. Stevenson.

Q. Left them altogether?

A. Yes, and I went home, and I telephoned him early in the morning I must see him; for fear that would get into the escrow, I must see him before he turned it in, but he had already sent them in, but he said it was a matter of small importance. They said this thing will be straightened up in a few weeks anyway, why not let it wait? I said "I have been conceding and conceding and conceding for a full year and I am tired of it."

Q. When did you see Mr. Logan about the matter?

A. I didn't see Mr. Logan at all.

Q. When did you see Mr. Stevenson?

A. Monday morning. I won't say Monday morning. I was under the impression it was the next day, but the next day was Sunday so it must have been Monday.

Q. In the morning?

A. In the morning.

Q. What time?

A. I think about eleven o'clock.

Q. Had the papers already gone into escrow?

A. Mr. Stevenson said so. Said "Well, they have gone in."

Q. What did you say then?

A. Well, I was very much disappointed and was very much chagrined. I felt that I had been done and I told him so and we had a scene.

Q. Why did you think you had been done?

A. I wanted this thing in my hand and if it hadn't

been for that the case would have gone to trial.

Q. This then, was between you and the attorney. You wanted the vindication in your hands before complete—

A. Yes.

Q. (continuing) before complete settlement was made, and under the agreement the vindication was to come to you when the release came to us?

A. No.

Q. What is the difference between you and the attorneys now?

A. The difference between me and the attorneys was that they considered the case settled. I was granting them ninety days to pay the three thousand dollars, and we placed our release subject to three thousand dollars. That could have been any time in ninety days.

Q. What are you objecting to now about the settlement with Walter Baker Moore in this case?

A. Simply because I have made it a point always that the settlement of that case would be the vindication of me without further trouble, without further publicity, from the entire family, on that entire case. That you have told me in reply we can't settle but one case. I have said in reply I have the other cases and will file them.

Q. Let's get back to the Walter Baker Moore case. I want to know what you object to now—wherein you claim anything has been done which has been detrimental. Now, you have Walter's vindication, that is it has been in the bank waiting for you

for some time.

A. Yes.

Q. You got the three thousand dollars, didn't you?

A. Yes.

Q. You kept that?

A. Well, I told my attorneys at any time I would refund it to you.

Q. Where is it now?

A. It is in my possession.

Q. Where?

A. I am not telling you where.

Q. You haven't got three thousand dollars, have you?

A. How do you know?

Q. I am just asking you what did you do with that money?

A. What did I do with that money?

Q. What did you do with the Moore three thousand dollars. I want to show she has used it. (to Court.)

A. I have used it. I was to considerable expense. I paid fifteen thousand dollars expenses on the case.

Q. Fifteen thousand or fifteen hundred?

A. Well, that's no worse than your mistake when you put three hundred thousand in a written instrument. You must remember, I am here alone.

Q. I want to know what you did with that money?

A. Fifteen hundred to Mr. Logan and Stevenson, and fifteen hundred I paid in expenses of this case.

Q. Now then, as I understand it, you got three

thousand dollars?

A. Yes.

Q. The vindication which was agreed upon that day has been in the bank waiting for you?

A. Yes, but that was not settlement of that case.

Q. And you have had an opportunity to get that at any time;—the additional three thousand has also—

A. Yes.

Q. (continuing) been in the bank waiting for you?

A. Yes.

Q. So that as far as the Walter Baker Moore matter is concerned, the only thing you claim you should have was that the vindication should have been handed over to you the day—

A. No, you are quite mistaken. You always get off on that. You three men told me it was not legal to settle up three or four cases under the head of one, and I said "all right then, this one will go to trial and I will be vindicated by Walter Baker Moore on this case—will be vindicated from the defamation of character cases". And my attorneys kept saying it is useless notoriety; it wasn't the thing for a woman to go into; why not settle on this; and I said "All right, I don't want any more publicity; I have had plenty."

Q. What is it you say you haven't got you think you should get in any matters?

A. The thing I didn't get was the vindication from Frank Allan Moore, or his wife, at the time or any time within ninety days.

Q. Do you object to the form of the vindication?

A. I don't, no.

Q. You don't?

A. It is a very good form.

Q. You notified the bank that you had rescinded everything on April 4th?

A. Yes.

Q. Now you say that what you really object to is that you didn't get that vindication within ninety days?

A. No, I didn't say anything of the kind, I said by return mail, within a few days. Don't think you can tie me up like that for my heart is in this case, and you can't.

Q. Let's go back and see. Let's read the record.

COURT: You said ninety days; that is what you said. Perhaps you didn't mean it. If you didn't mean it, correct it.

A. What I meant to say is, you did not procure this within ninety days.

Q. Didn't procure within ninety days?

A. No.

Q. Are you objecting to that?

A. No, I don't object to that. What I object to is I did not get them as you promised by return mail.

Q. What you object to is you didn't get them by return mail. Did you expect, if it got back by return mail, it would be given immediately to you?

A. Surely.

Q. And the release of Frank delivered to me?

A. Surely.

Q. Without payment of the additional three thousand?

A. The payment of the additional three thousand had absolutely nothing to do with that—I am getting kind of mixed in my English.

Q. I don't want to mix you up.

A. The thing is this: On the payment of that three thousand dollars, you were entitled to the release that was lying in escrow, don't you see?

Q. I see.

A. Because that other vindication got accidentally put in there, it was tied up for ninety days. I objected to that at the time.

Q. I wanted one hundred and twenty; you wanted sixty, and we compromised on ninety.

A. I don't know anything about that. I left that to Mr. Logan.

Q. Let's get back to the Frank A. Moore matter. Then, as I understand it, getting right down now, you have eliminated a lot of these matters in controversy, apparently. The only thing then that you take exception to is this, apparently, that the Frank A. Moore and wife vindication did not come back as soon as you thought it should. That is, it didn't come back by return mail.

A. Well, the fact that they all laughed around the country, and Mr. Lee told it broadly and the boys told it broadly that they got a "cheap settlement because they had the goods on her." And every little while I went to the office "Have you heard?" "No, not yet, but be patient, they will come. They will come."

Now, on the 24th day of May, Mr. Logan asked me to come down to the office.

Q. Mr. Logan?

A. Mr. Logan in May. That was Saturday afternoon; the ninety days were up and he says: "The only way for you to get the vindication out of escrow is to go down and release the bank from that." I said "I am not going to take that. I don't want that." I told him what had been said about me; the vilest things that had been said about any woman, after they had all promised, and you had promised as their attorney.

Q. That is in the office that afternoon?

A. Yes.

Q. You are confining all your testimony touching me to that office—that occasion?

A. That afternoon.

Q. I never saw you after that?

A. No.

Q. Nor before?

A. But you promised, and you further told me that Miles C. Moore had confided to you that I was all I represented myself to be. I was a clean good woman, and it was the regret of his life that we didn't marry.

Q. When did I say that?

A. When Mr. Stevenson was out with his stenographer, and that moment Mr. Logan was entering the room.

Q. Anybody else there but you and I?

A. You and I, and you also told the same thing

to Mr. Stevenson, on another occasion. Do you remember that?

Q. No, I don't remember that at all. I do remember telling you that I never heard Governor Moore say a word against you. I say that now.

A. Yes, and do you remember your saying that he regretted it very much.

Q. No, I never said—I don't remember saying anything of that kind.

A. Do you remember saying that to anybody else?

Q. No, because it wouldn't agree with the facts.

A. Well, you are very harsh.

Q. I have a very distinct recollection of telling you and I tell you again that Miles C. Moore has never said a word to me detrimental to your character.

A. Well he couldn't. He couldn't and tell the truth.

Q. Then as I understand, the real trouble is you feel that the vindication of Frank should have been back within a couple of days, and not having done so, you have been wronged or deceived?

A. It isn't a matter of time at all. They went forth and said anything they wanted to say, and Mr. Lee as their agent, went down to San Francisco with the Oregon First Expedition, and in the Palace Hotel called a friend of mine out and said the vilest things after they had retracted the things and he has been their paid agent all the time. You know that.

Q. No, I don't know that. I know that is not true.

A. Who authorized him to bribe Mr. Stevenson with railway stock?

Q. I don't know. Some of Sidney Gordon's dreams, I suppose.

A. And it was a Sidney Gordon dream sending me to China, I suppose?

Q. I thing so.

A. You think so. You don't know anything about that intrigue to send me to China?

Q. No.

A. Do you know anything about taking me to Paris to seduce me and drop me?

Q. No, I don't. Now what else? We have heard about going to China and an intrigue to take you to Paris for seductive purposes?

A. No, I was to go on a case. I was to take Mrs. Jordon traveling around the world?

Q. Mrs. Jordon?

A. Yes.

Mr. NOLAN: That line of testimony is entirely outside.

Mr. CLARK: I didn't bring it out.

COURT: That has nothing to do with this case.

Q. What are you objecting to?

A. I am objecting to the fact that it was not turned over to me and I was not able to vindicate myself, and put those things on record and refer my friends and people to those things at the time that settlement was made.

Q. You say time was not of any particular consequence to you but what you want is the vindication.

A. I see I have to be very particular what I say here.

Q. What I want is the fact, Miss Cronen.

A. The fact is this: I object to your not delivering this by return mail as you said you would, or within a few days afterwards. That would have been all right. Not wait until the 29th day of February. I wanted to have this on record when my attorneys came to the courtroom and said the case was called off. I wanted to show that as a part of my statement, instead of their going around the country saying they got a cheap settlement. "We had the goods on her and she had to do that." You haven't got the goods on me.

Q. Who said that?

A. Walter Baker Moore said that. Miles C. Moore said that and Frank said it.

Q. Who did he say it to?

A. That is some of my evidence; I know.

Q. Well, you said he said it.

A. He said it.

Q. Who did Miles C. Moore say that to?

Mr. NOLAN: That is outside of the case.

Mr. CLARK: I don't think the witness should bring that up. That is all.

A. Here is a thing I want to tell you. You have a man named Parker, not more than two weeks ago—

COURT: Never mind that.

Redirect Examination.

Q. Where were Frank A. Moore and Margaret Gleason Moore at the time this statement was made?

A. I don't know, but I think in Walla Walla.

Q. You spoke about return mail. How long would it take in the ordinary course of affairs for mail to go to Walla Walla and back?

A. I don't know; two days or three probably.

Witness excused.

Defense rests.

JOHN H. STEVENSON, recalled in rebuttal.

Direct Examination.

Questions by Mr. CLARK:

Mr. Stevenson, you have heard the testimony of Miss Cronen, to the effect that this Exhibit 5 is not the paper that was dictated, prepared and signed in your office on February 24th. I ask you what is the fact about it?

A. This is the paper, yes.

Q. Is that the form of vindication agreed upon at that time?

A. The form as agreed upon that day, yes.

Q. There was no substitution of any paper for the one that was prepared that day?

A. If there was, it was done in the bank.

Q. What?

A. If there was a substitution, it was done in the bank, after it left my possession.

Q. That is your signature?

A. That is my signature.

Q. That is your office paper?

A. That is the office paper, yes, sir.

Witness excused.

JOHN F. LOGAN, recalled in rebuttal.

Direct Examination.

Questions by Mr. CLARK:

Mr. Logan, you heard the testimony of Miss Cronen, touching this paper, Exhibit 5. State whether or not that is the paper prepared in your office that day?

A. That contains in substance the paper that was signed that day.

Q. What do you mean by "contains in substance the paper"?

A. If I remember anything, I remember that that was the paper.

Q. Your office made no substitution?

A. Oh, no.

Q. That is on your office paper?

A. Yes.

Q. Written by your stenographer?

A. Yes. A boy or young man, I think. I am not sure. I forget the—when that was to be returned. I didn't remember that the 90 days was in there; that is, the 90 day clause was in there; but it was to be turned over when the money, when everything was settled.

Q. Did you hear anything to the effect that these vindications were to be delivered forthwith, or weren't all the papers to be interchanged at the same time?

A. Oh yes, everything was to be interchanged at the same time. The notion I got, and I got the im-

pression from somebody, Lee or yourself, the \$6,000 could be paid practically at any moment.

Q. I think I told you I would endeavor to get it within ten days or two weeks.

A. Yes, there is where the two weeks came in—the whole thing in two weeks.

Q. I hoped to be able to settle within two weeks. But didn't for five or six weeks.

A. It was within two weeks; I remember distinctly Miss Cronen was insistent about when it was to come down, and you, out of an abundance of caution, to give plenty of time for the paper to go up to Frank Allan Moore and back—the reason why they left out the Governor, was because this vindication would delay the final settlement, and Miss Cronen—

Q. I suggested if he was coming in, we should take 120 days.

A. And Miss Cronen was so insistent on getting a final vindication, she let him go, and we got the impression it was to be two weeks, was to be in a reasonable time; and out of an abundance of caution you took 90 days to get them back.

Q. Everything was to be settled at one time?

A. Yes, but she got the impression, and that is where I was—I will know better next time—she got the impression was to come back within two weeks. Now, the matter of the trouble afterwards, the accusation afterwards—

Q. I don't care for that.

A. She brought that to the office, and I am aware that is what caused the young woman to make trou-

ble afterwards.

Q. I don't care anything about that, and I regret very much if any such thing occurred. No one regrets it more than I.

A. I think it my duty to state that Miss Cronen called up the fact they might traduce us afterwards, and it was the legal opinion that it was outside of the case. You and I and Mr. Stevenson agreed that what they might do in the future was something outside of this case. Five minutes after they signed these vindications, they could turn around and repeat what they said, and that would be a subsequent case in itself. We couldn't settle it at that time. That was our legal opinion—a matter outside of the case.

Q. You took the opinion that nothing was settled subsequent to February 24th?

A. That is exactly it, what they might do in the future would have nothing to do with this case, and it would have to be a subsequent case against any one who might traduce her character thereafter. That is what our opinion was, but these papers were to come back in a reasonable time, and that reasonable time was before the trial, and that reasonable time was two weeks. But there was nothing contractual.

Witness excused.

V. R. LISMAN, a witness called on behalf of the plaintiff in rebuttal, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. CLARK:

Mr. Lisman, on February 24, 1912, where were you

employed?

A. Mr. Logan's office, Logan & Stevenson.

Q. Do you recall that I was in the office on the afternoon of that day?

A. Yes, sir.

Q. And did you—in what room did you see me?

A. Mr. Stevenson's room.

Q. And did you see Miss Cronen there, this lady sitting at the table?

A. Yes, sir.

Q. And Mr. Logan was there, Mr. Stevenson was there?

A. Yes, sir.

Q. While we were all there, were you called in and certain papers dictated to you?

A. Yes, sir.

Q. Where were the papers dictated?

A. Mr. Stevenson's room.

Q. You sat at the table in his room?

A. Yes, sir.

Q. And do you know whether or not the rest of us were sitting around the table close by?

A. Yes, sir, you were all.

Q. Miss Cronen was in the room when the dictation occurred?

A. Yes, sir.

Q. And you thereafter transcribed the dictation?

A. I did.

Q. And having reduced it to writing, what did you do with it?

A. I think I gave it to Mr. Stevenson.

Q. Brought it back into his room?

A. Yes, sir.

Q. I show you a paper marked Exhibit 5, and ask you whether or not that is the document transcribed from the dictation which you received at the time in question?

A. That is the one.

Q. And did you write the second document there, the second release also at the same time?

A. Yes, sir.

Q. Now, was more than one document dictated to you touching this matter at that time? I mean of this character—this stipulation?

A. Not that day.

Q. Is that a true transcription of the notes which you received at the time of the dictation taken in Miss Cronen's presence?

A. Yes, sir.

Witness excused.

Plaintiff rests.

Defense rests.

[Endorsed]: Transcript of Testimony. Filed Feb. 19, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 6 day of March, 1913, there was duly filed in said Court, a Petition for Appeal in words and figures as follows, to wit:

[Petition for Appeal.]

*In the District Court of the United States for the
District of Oregon.*

WALTER BAKER MOORE,

Plaintiff,

vs.

MARY E. CRONEN, and SECURITY SAVINGS
& TRUST COMPANY, a Corporation,
Defendants.

The above named defendant, Mary E. Cronen, conceiving herself aggrieved by the decree made and entered herein on Septembr 9th, 1912, finding for plaintiff and against the defendant, hereby appeals from the said decree to the United States Circuit Court of Appeals for the Ninth District; and files herein her assignment of errors asserted and intended to be urged on appeal.

The defendant prays for an order of this Court staying all further proceedings upon the said decree pending this appeal, upon defendant giving a good and sufficient bond to be approved by this Court.

STOTT & COLLIER,

Attorneys for Defendant,

Mary E. Cronen.

[Endorsed]: Petition for Appeal. Filed March 6,
1913.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 6 day of March, 1913,
there was duly filed in said Court, an Order Al-

lowing Appeal in words and figures as follows, to wit:

[Order Allowing Appeal.]

*In the District Court of the United States for the
District of Oregon.*

WALTER BAKER MOORE,

Plaintiff,

vs.

MARY E. CRONEN, and SECURITY SAVINGS
& TRUST COMPANY, a Corporation,
Defendants.

Having considered the defendant Mary E. Cronen's Petition for allowance of appeal and supersedeas from the Decree made and entered herein on September 9th, 1912, together with the assignment of errors, upon motion of E. P. Stott of Attorneys for Defendant, Mary E. Cronen, the appeal of defendant is allowed as prayed, upon giving a bond in the sum of \$1000.00 to be approved by this Court; which bond shall operate as a supersedeas from the date of its approval, and that the clerk of this court shall hold said sum of \$2935.20 paid into court for the benefit of defendant until further order of court.

Dated March 6, 1913.

R. S. BEAN,

Judge.

[Endorsed]: Order Allowing Appeal. Filed Mar. 6, 1913.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 6 day of March, 1913, there was duly filed in said Court, a Bond on Appeal in words and figures as follows, to wit:

[Bond on Appeal.]

*In the District Court of the United States for the
District of Oregon.*

WALTER BAKER MOORE,

Plaintiff,

vs.

MARY E. CRONEN, and SECURITY SAVINGS
& TRUST COMPANY, a Corporation,
Defendants.

United States Fidelity and Guaranty Company of Baltimore, Md., Surety, is held and firmly bound unto Walter Baker Moore, complainant above named, in the sum of \$1000.00 to be paid unto the said complainant; for the payment of which, well and truly to be made, said United States Fidelity and Guaranty Company, and its successors and assigns, binds itself and its successors and assigns forever firmly by these presents. The defendant, Mary E. Cronen above named, has been allowed an appeal to the United States Circuit Court of Appeals for the Ninth District and supersedeas from the decree entered in the above entitled suit on September 9th, 1912; and the condition of this obligation is that if the said defendant, Mary E. Cronen, shall prosecute her appeal to effect and answer the costs taxed in the decree appealed from, together with all damages, interests and cost of such appeal and supersedeas; if she, Mary E.

Cronen, defendant, fails to make her said appeal good, then this obligation to be void, otherwise to remain in full force.

Signed, sealed and delivered this 6th day of March, 1913.

MARY E. CRONEN,
THE UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY,

[Seal]

By DOUGLAS R. TATE,

Its Attorney in Fact.

The foregoing bond approved on March 6, 1913.

R. S. BEAN,

Judge.

[Endorsed]: Bond. Filed Mar. 6, 1913.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 6 day of March, 1913, there was duly filed in said Court, Assignments of Error in words and figures as follows, to wit:

[Assignments of Error.]

*In the District Court of the United States for the
District of Oregon.*

WALTER BAKER MOORE,

Plaintiff,

vs.

MARY E. CRONEN, and SECURITY SAVINGS
& TRUST COMPANY, a Corporation,
Defendants.

In connection with its petition for allowance of appeal herein, defendant Mary E. Cronen makes and

files this assignment of errors made by the Court in its decree entered hereby on September 9th, 1912.

I.

The Court sitting as a Court of equity erred in assuming jurisdiction over and rendering a decree in the above entitled cause, for the reason that the cause of action, if any, shown by the bill of complaint is at law; and the Court is, and at all times was wholly without jurisdiction of the subject matter.

II.

The Court erred in not dismissing complainant's bill for no equity shown.

III.

The Court erred in deciding or adjudging that the attorney for defendant Mary E. Cronen, had authority as agents, or otherwise, to enter into a contract for and on behalf of defendant Mary E. Cronen with Walter Baker Moore the plaintiff herein, or with his duly authorized agent or agents.

IV.

The Court erred in deciding or adjudging that a contract was made and entered into by and between plaintiff Walter Baker Moore and defendant Mary E. Cronen, acting by their respective attorneys.

V.

The Court erred in deciding or adjudging that defendant Mary E. Cronen could not rescind the alleged contract the above entitled Court has adjudged was entered into by and between Walter Baker Moore, the plaintiff herein, and Mary E. Cronen defendant herein, acting by their respective attorneys.

VI.

The Court erred in deciding or adjudging that Walter Baker Moore the plaintiff herein had performed the part of the alleged contract incumbent upon him to be performed by the terms of said alleged contract.

VII.

The above entitled Court erred in rendering any decree in said cause other than a decree dismissing the plaintiff's complaint in equity.

VIII.

The above entitled Court erred in not rendering a decree dismissing the complaint in equity herein.

WHEREFORE defendant prays that the decree herein be reversed and that plaintiff's bill be dismissed.

STOTT & COLLIER,
Attorneys for Defendant
Mary E. Cronen.

[Endorsed]: Assignment of Errors. Filed Mar. 6, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 5 day of April, 1913, there was duly filed in said Court, a Citation on Appeal in words and figures as follows, to wit:

[Citation on Appeal.]

UNITED STATES OF AMERICA,
DISTRICT OF OREGON.—ss.
To WALTER BAKER MOORE, plaintiff, and A.
E. CLARK, his attorney, Greeting:

WHEREAS, Mary E. Cronen has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the District Court of the United States for the District of Oregon, in your favor, and has given the security required by law; You are, therefore, hereby, cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 4th day of April in the year of our Lord, one thousand, nine hundred and thirteen.

CHAS. E. WOLVERTON,

Judge.

[Endorsed]: Citation on Appeal. Filed Apr. 5, 1913.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 25 day of March, 1913, there was duly filed in said Court, an Order to Reproduce Evidence in words and figures as follows, to wit:

[Order to Reproduce Evidence.]

*In the District Court of the United States for the
District of Oregon.*

WALTER BAKER MOORE,

Plaintiff,

vs.

MARY E. CRONEN and SECURITY SAVINGS
& TRUST COMPANY, a Corporation,
Defendants.

The above entitled cause now coming on to be heard on the stipulation of plaintiff and defendant, Mary E. Cronen for an order of the above entitled court re-producing in the appeal of this cause to the United States Circuit Court of Appeals for the Ninth District the testimony adduced at the time of the trial of said cause in the above entitled court in its entirety, and in the exact words of the witnesses.

And it further appearing to the court that it is necessary and essential in the appeal of said cause that the testimony be re-produced in its entirety and in the exact words of the witnesses.

It is therefore Ordered and Adjudged that the testimony adduced at the time of the trial of this cause in the District Court of the United States for the District of Oregon be, on the appeal of said cause, reproduced in its entirety in the exact words of the witnesses.

CHAS. E. WOLVERTON,
Judge.

Dated this 25 day of March, 1913.

WHEREAS, Mary E. Cronen has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the District Court of the United States for the District of Oregon, in your favor, and has given the security required by law; You are, therefore, hereby, cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 4th day of April in the year of our Lord, one thousand, nine hundred and thirteen.

CHAS. E. WOLVERTON,

Judge.

[Endorsed]: Citation on Appeal. Filed Apr. 5, 1913.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 25 day of March, 1913, there was duly filed in said Court, an Order to Reproduce Evidence in words and figures as follows, to wit:

[Order to Reproduce Evidence.]

*In the District Court of the United States for the
District of Oregon.*

WALTER BAKER MOORE,

Plaintiff,

vs.

MARY E. CRONEN and SECURITY SAVINGS
& TRUST COMPANY, a Corporation,
Defendants.

The above entitled cause now coming on to be heard on the stipulation of plaintiff and defendant, Mary E. Cronen for an order of the above entitled court re-producing in the appeal of this cause to the United States Circuit Court of Appeals for the Ninth District the testimony adduced at the time of the trial of said cause in the above entitled court in its entirety, and in the exact words of the witnesses.

And it further appearing to the court that it is necessary and essential in the appeal of said cause that the testimony be re-produced in its entirety and in the exact words of the witnesses.

It is therefore Ordered and Adjudged that the testimony adduced at the time of the trial of this cause in the District Court of the United States for the District of Oregon be, on the appeal of said cause, reproduced in its entirety in the exact words of the witnesses.

CHAS. E. WOLVERTON,

Judge.

Dated this 25 day of March, 1913.

[Endorsed]: Order. Filed March 25, 1913.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on Saturday, the 5 day of April, 1913, the same being theJudicial day of the Regular March 1913 Term of said Court; Present: the Honorable CHAS. E. WOLVERTON, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Order Enlarging Time to File Transcript.]

*In the District Court of the United States for the
District of Oregon.*

No. 5689.

April 5, 1913.

WALTER BAKER MOORE,

Plaintiff,

vs.

MARY E. CRONEN, et al,

Defendants.

Now, at this day, for good cause shown, it is Ordered that the defendants' time for filing and docketing the record on appeal in this cause, in the United States Circuit Court of Appeals, Ninth Circuit, be and the same is hereby enlarged and extended ninety (90) days from this date.

CHAS. E. WOLVERTON,

District Judge.

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IN THE

**United States Circuit
Court of Appeals**

NINTH DISTRICT

MARY E. CRONEN,
Appellant,

vs.

WALTER BAKER MOORE,
Appellee.

BRIEF OF APPELLANT

Upon Appeal from the United States District Court for
the District of Oregon.

Hon. R. S. Bean, Judge

STATEMENT.

On July 17, 1912, the appellee filed in the District Court of the United States for the District of Oregon his Bill of Complaint against the appellant seeking to compel the specific performance on the part of the appellant

of a certain agreement entered into by appellee and appellant acting through their respective attorneys.

Prior to the execution of said agreement referred to in appellee's complaint and appellant's answer thereto, there had existed between appellee and appellant a promise of marriage, which had been broken by Walter Baker Moore, appellee herein, and a suit was pending in the District Court of the United States for the District of Oregon in which Mary E. Cronen, appellant herein, sought the recovery of damages for the breach of promise on the part of Walter Baker Moore. The suit for the breach of promise was at issue and set for trial in said Court on the 29th day of February, 1912. Negotiations had been opened between A. E. Clark, acting as attorney for the appellee herein and John F. Logan and John H. Stevenson, acting as attorneys for the appellant herein, for a settlement of the suit started by Mary E. Cronen against Walter Baker Moore. Such negotiations looking to the settlement of the suit for breach of promise had been continued and pending for several months just previous to the execution of the agreement above referred to. On February 24, 1912, the parties thought they had arrived at such settlement. Accordingly the aforesaid attorneys and appellant met in the office of John H. Stevenson, in Portland, Oregon, to perfect the terms of the settlement. Under the terms of this settlement appellant was to receive from appellee the sum of \$6000.00 and to dismiss her suit for the breach of promise and to execute and deliver to appellee a full release and discharge of all her claims and demands of whatsoever nature against him. In addition appellee was to deliver to Miss Cronen a statement of the high moral character of appellant.

It has been contended by the appellant herein that at the time the promise of marriage existed between the appellee and appellant and after the same had been broken by appellee, that the family of Walter Baker Moore,—principally his brother Frank Allen Moore and the wife of Frank Allen Moore and the father, Miles C. Moore,—had made certain statements assailing the good, moral character and chastity of this appellant. At this meeting of the attorneys and appellant on February 24, 1912, appellant demanded that a signed statement by Mr. and Mrs. Frank Allen Moore be delivered to her vindicating her of such charges of unchastity and certifying to her high standard of moral character. It was agreed by the attorney for appellee that such statement would be executed and delivered to appellant.

At this same meeting of the attorneys and appellant above referred to it was found inconvenient and impossible to perfect a full and complete settlement of the controversy in accordance with the terms agreed upon on that day. However, it was on that day further agreed, that there be placed in escrow with the Security Savings & Trust Company of Portland, Oregon, (1) a stipulation for the dismissal by appellant of her suit for breach of promise; (2) release and discharge of Walter Baker Moore by Mary E. Cronen of all claims and demands against Walter Baker Moore, and (3) a statement signed by Walter Baker Moore certifying to the good, moral character of appellant. A letter of instruction dated February 24, 1912, and signed by John H. Stevenson as attorney for appellant, and A. E. Clark, as attorney for appellee, was directed to the said Security Savings & Trust Company. A copy of said letter of instruction appears on page 49 of the Transcript of

Record and is marked "Plaintiff's Exhibit I." Accompanying such letter of instruction were the (1) stipulation, (2) release and (3) statement agreed to be placed in escrow, copies of which appear on pages 50, 51 and 52, respectively, of the Transcript of Record and are marked "Plaintiff's Exhibit 2," "Plaintiff's Exhibit 3" and "Plaintiff's Exhibit 4," respectively. By the terms of this escrow agreement, as will more fully appear by reference to the above mentioned letter of instruction, \$3000.00 of the \$6000.00 agreed to be paid appellant was paid to her at the time the agreement was made, and the additional \$3000.00 was to be paid within 90 days from date, or May 24, 1912. Upon the payment of said additional \$3000.00 within the 90 days the Security Savings and Trust Company was to deliver to appellee the stipulation and release accompanying the letter of instruction, and the statement of vindication signed by Walter Baker Moore was to be delivered to the appellant.

At the meeting of the attorneys and appellant above referred to Miss Cronen, the appellant, demanded that a statement of vindication of the charges made against her be signed by Mr. and Mrs. Frank Allen Moore and delivered to her. And because of the derogatory statements assailing the appellant's character, which were alleged to have been made by the family of Walter Baker Moore, appellee, such signed statement was to be forthwith delivered to appellant. Thereupon a stipulation was at this time entered into between John H. Stevenson acting as attorney for Mary E. Cronen, and A. E. Clark, acting as attorney for Walter Baker Moore, whereby upon the delivery to the said Security Savings and Trust Company Bank of a written statement, signed

by Frank Allen Moore and Margaret Gleason Moore, certifying to the moral character of Mary E. Cronen, this appellant was to cause to be delivered to appellee a release of all claims and demands that she may have against Frank Allen Moore and Margaret Gleason Moore and Miles C. Moore. A copy of which stipulation appears in the Transcript of Record on page 61 and is marked "Plaintiff's Exhibit 5," and a copy of which release appears in the Transcript of Record on page 63 and is marked "Plaintiff's Exhibit 6."

At the time of the execution of the stipulation last referred to and marked "Plaintiff's Exhibit 5," it was understood that such statement signed by Frank Allen Moore and Margaret Gleason Moore was to be delivered to this appellant as soon as such could be drafted and mailed to Walla Walla, Washington, for the signature of Frank Allen Moore and Margaret Gleason Moore and then returned, and a space of two weeks was agreed in which to make such delivery of the statement to appellant. No such statement was delivered or tendered appellant in accordance with the terms of the agreement and on April 4, 1912, appellant wrote the Security Savings and Trust Company a letter rescinding and cancelling all agreements heretofore made with Walter Baker Moore or his attorney in regard to the controversy between Walter Baker Moore and herself. A copy of which letter appears on page 109 of the Transcript Record and is marked "Plaintiff's Exhibit 8."

In explanation, it will be observed from the foregoing statement of the facts in this case that appellant for a consideration of \$6000.00 and the delivery to her of a statement of her good moral character, signed by ap-

pellee, was to release appellee from all claims and demands against him and dismiss her suit for the breach of promise. A limit of 90 days from the execution of the escrow agreement was placed upon the fulfillment of this part of the agreement. In further explanation, it will be observed that appellant's attorney and the attorney for the family of appellee entered into a stipulation at the same time and place whereby appellant was to release Frank Allen Moore, Margaret Gleason Moore and Miles C. Moore from all claims and demands against them upon the delivery to appellant of a statement signed by Frank Allen Moore and Margaret Gleason Moore certifying to her high moral character.

It is our contention that the statement last referred to was to be delivered immediately or at the outside within a space of two weeks from the time such stipulation was entered into. It is also our contention that such statement was not delivered in accordance with the terms of the agreement and that such was never delivered or a tender of delivery ever made prior to the trial of this suit, and because such was not delivered in accordance with the terms of the agreement, we claim that the Court erred in granting the relief to appellee prayed for in his complaint.

It is our further contention that the stipulation calling for the payment of the \$6000.00 and the delivery of the statement by Walter Baker Moore to appellant in exchange for her discharge of appellee and the dismissal of the suit against him, and also the stipulation calling for the delivery of the statement signed by Frank Allen Moore and Margaret Gleason Moore in exchange for their discharge by appellant formed one and

the same escrow agreement. In other words, that the two stipulations went to make up a part of the agreement for the settlement of the controversy between appellant and appellee, and that a fulfillment of the contract was only made when all the terms embodied in the two stipulations and the letter of instruction to the Security Savings and Trust Company had been complied with. The decree of the trial Court was erroneous in failing to decree the delivery of the statement signed by Frank Allen Moore and Margaret Gleason Moore to this appellant in exchange for her release of all claims against them, as agreed to in the stipulation shown on page 61 of the Transcript of Record.

ASSIGNMENT OF ERRORS.

The appellant has assigned and does assign as errors committed by the Court and apparent on the face of the record, the following, to-wit:

I.

The Court sitting as a Court of Equity erred in assuming jurisdiction over and rendering a decree in the above entitled cause, for the reason that the cause of action, if any, shown by the bill of complaint is at law; and the Court is, and at all times was wholly without jurisdiction of the subject matter.

II.

The Court erred in not dismissing complainant's bill for no equity shown.

III.

The Court erred in deciding or adjudging that the attorney for defendant Mary E. Cronen, had authority as agents, or otherwise, to enter into a contract for and on behalf of defendant Mary E. Cronen with Walter Baker Moore the plaintiff herein, or with his duly authorized agent or agents.

IV.

The Court erred in deciding or adjudging that a contract was made and entered into by and between plaintiff Walter Baker Moore and defendant Mary E. Cronen, acting by their respective attorneys.

V.

The Court erred in deciding or adjudging that defendant Mary E. Cronen could not rescind the alleged contract the above entitled Court has adjudged was entered into by and between Walter Baker Moore, the plaintiff herein, and Mary E. Cronen defendant herein, acting by their respective attorneys?

VI.

The Court erred in deciding or adjudging that Walter Baker Moore the plaintiff herein had performed the part of the alleged contract incumbent upon him to be performed by the terms of said alleged contract.

VII.

The above entitled Court erred in rendering any de-

cree in said cause other than a decree dismissing the plaintiff's complaint in equity.

VIII.

The above entitled Court erred in not rendering a decree dismissing the complaint in equity herein.

POINTS AND AUTHORITIES.

I.

The escrow agreement may be partly written and partly oral.

Campbell v. Thomas, 42 Wis. 437.

Stanton et al v. Miller et al, 58 N. Y. 202.

Gaston v. City of Portland, 16 Oregon 255.

II.

Time may be made of the essence of the contract by the express stipulation of the parties, or, without such express agreement, by the nature of the contract itself, or of the circumstances under which it was made.

Gale and Gale v. Archer, 42 Barbour (N. Y.) 320.

Quinn v. Roath, 37 Conn. 16.

Taylor v. Longworth, 39 Peters (U. S.) 70.

Ewing v. Crouse, 6 Ind. 312.

Hull Coke & Coal Co. v. Empire Coal & Coke Co.,
113 Federal 256.

III.

Failure of the plaintiff to make good his representations as to future acts to be performed by him, and which were a material inducement to defendant to enter into the contract, constitutes a defense to specific performance, although the representations were no part of the contract, and although there is no doubt as to plaintiff's legal right under the contract.

Beaumont v. Dukes, Jac. 422, 23 Rev. Rep. 110,
4 Eng. Ch. 422, 37 Eng. Reprint 400.

Vol. 36, Cyclopedia of Law and Procedure 700.

IV.

The entirety of a contract depends upon the intention of the parties and not the divisibility of the subject.

Shinn v. Bodine, 60 Pa. St. 182.

Pope v. Porter, 102 N. Y. 366.

Norrington v. Wright, 115 U. S. 188.

Clark v. Wheeling, 53 Federal 494.

V.

Where two or more written instruments are executed on the same day, relate to the same subject matter, and one refers to the other, the presumption is that they evidence but a single contract.

Byrne v. Marshall, 44 Ala. 355.

Sewall v. Henry, 9 Ala. 24.

Vangine et al v. Taylor, 18 Ark. 65.

Rogers et al v. Kneeland, 13 Wend. (N. Y.) 116.

Vol. 9, Cyclopedia of Law and Procedure, 580-581.

VI.

The decree must conform to the contract.

Bennett v. Giles, 111 Ill. App. 428.

Freeburgh v. Lamoureux, 15 Wyo. 22.

26 Am. Eng. Enc. of Law, 66 (2nd Ed.)

20 Ency. of Pleading & Practice, 496.

Giplin v. Watts, 1 Colo| 479.

VII.

Specific performance is an equitable remedy, which compels the performance of a contract in the precise terms agreed upon, or such a substantial performance as will do justice to the parties under the circumstances of the case.

Stoddard v. Hart, 23 N. Y. 556.

Rison v. Newberry, 90 Va. 521.

Owens v. Hall, 13 Ohio St. 571.

Freeburgh v. Lamoureux, 15 Wyo. 22.

Vol. 22 Am. & Eng. Ency, of Law 909 (1st Ed.)

IX.

The defendant may have specific performance of the version of the contract as set up and proved.

Thompson v. Hawley, 14 Oreg. 199.

Garrett v. Goff, 61 W. Va. 221.

Bradford v. Union Bank of Tennessee, 13 How. (N. Y.) 69.

X.

In a suit for specific performance the defendant has a right to plead in his answer, as new matter, a contract different from the one alleged in the complaint, and the Court will then ascertain from the evidence which was the real contract.

Thompson v. Hawley, 14 Oreg. 199.

XI.

The judgment in equity cases is not controlled by the prayer for relief.

Gilmore v. Gilmore, 7 Oregon 374.

State v. Tooker, 46 Pac. 33.

Davis v. Davis, 23 Pac. 715.

Polk v. Wendall, 9 Cranch. 87.

Century Digest, Vol. 19, Equity, 1005.

ARGUMENT.

Our contention in this case is, that the appellee was not entitled to his decree for specific performance obtained in the trial Court. The main propositions involved in the case, briefly stated, are as follows, namely: (1) Within what time, if any, the terms of the escrow

agreement were to be fully performed upon the part of the appellee; and (2) was the time in which the terms of such escrow agreement were to be performed of the essence of the contract; and (3) did the appellee make performance, or tender of performance, within such time; and (4) did the non-performance, or tender of performance, on the part of the appellee, within that time work a forfeiture of any right the appellee may have had under the contract.

In our argument we hold that there was a time in which the terms of the escrow agreement were to be fully performed on the part of the appellee, and that such time was of the essence of the contract, and that the appellee failed to make performance, or tender of performance, within such time, and that the non-performance, or tender of performance, on the part of the appellee within that time deprived him of any right to the relief sought in his complaint.

A further point of argument urged by appellant is, that the two stipulations were a part of the escrow agreement and the terms of the same taken together formed a contract of entirety. If the appellee was entitled to his decree for specific performance at all, such decree should have been one enforcing the full terms of the escrow agreement and the Court was without power to grant only a partial performance thereof, and that it was error to grant a decree which compelled only partial performance.

In discussing the propositions mentioned we have deemed it necessary that due regard be had at all times for the facts and circumstances surrounding and enter-

ing into the execution of the escrow agreement between the parties. For it will be seen that appellant by the escrow agreement was not only to release Walter Baker Moore, appellee, from all claims and demands against him, but was to also release certain members of appellee's family from all claims and demands against them. It was the things which formed the attendant circumstances surrounding the execution of the escrow agreement and from which the appellant wished to be freed and vindicated of, that actuated appellant in consenting to give the release of the appellee's family.

THE ESCROW AGREEMENT MAY BE PARTLY WRITTEN AND PARTLY ORAL.

We contend that the agreements made at the meeting of the appellant and the attorneys for appellant and appellee on February 24, 1912, formed one and the same contract. We further contend that there is no question but what some of the terms of this agreement as mentioned in the letter of instruction to the Security Savings and Trust Company (Plaintiff's Exhibit I" Transcript of Record, page 49), were to be fully performed and complied with within 90 days, or by May 24, 1912. The stipulation ("Plaintiff's Exhibit 5" Transcript of Record, page 61) entered into between the attorneys representing the respective parties calls for the delivery by applee of a statement of the good moral character of appellant, signed by Frank Allen Moore and Margaret Gleason Moore, to the Security Savings and Trust Company and the surrender by the Security Savings and Trust Company, upon the delivery of the same, of a full release by Mary E. Cronen of Frank Allen Moore, Mar-

garet Gleason Moore and Miles C. Moore of all claims and demands against them. The **time** in which this statement, last referred to, was to be delivered, is a question in dispute.

As mentioned in our STATEMENT, of the **facts** and **circumstances** surrounding the execution of the escrow agreement, Mary E. Cronen, appellant herein, claimed that certain statements had been made by the family of appellee imputing unchastity to her and attacking her moral character. Her claim was well known to the attorney for the appellee. (Transcript of Record, pages 118 and 125). The testimony shows clearly that her suit for the breach of promise was commenced for other reasons than the mere obtaining of a money judgment. (Transcript of Record, pages 96 and 101). She was a good woman. Had entered into this promise of marriage with appellee in good faith and sincerity. Had told her friends that she was about to be married to appellee, and she was looking forward to the event with joyful satisfaction. The date of the marriage was postponed and finally the appellee refused to marry her at all. The family of the appellee had spread broadcast among the friends and acquaintances of appellant charges imputing to her unchastity and immoral conduct. It was with shame that she faced her own people and her friends. She became almost an outcast because of these unwarranted statements made for the purpose of breaking off the engagement. It was from the stigma of these false charges that this poor woman was suffering, and not from the fact that her engagement was broken, and not for the want of money damages to sooth her. She wanted to be vindicated of these untrue state-

ments. She wanted her friends and associates to know that such statements were false. She wanted that good name back. This was the moving cause and the one essential thing entering into the execution of the escrow agreement on her part. Her suit for breach of promise was to be tried within five days of the time this agreement was made. She had hoped that within five or six days the result of that suit would be such as to enable her to go to her own people and her friends and say to them that these charges were untrue and groundless. With the obtaining of this vindication of the charges made against her uppermost in her mind, can it be said that she entered into this agreement with no understanding as to when such statement of vindication was to be made and delivered to her? Can it be said that she was willing that such statement of vindication was to be delivered to her at the convenience of the appellee? And keeping in mind her anxiety and insistence upon having this statement, and keeping in mind the fact that within five or six days the testimony produced at the trial of the suit for breach of promise would in itself show the falsity of these charges, can it be said she was willing that appellee should have 90 days, as claimed by appellee, in which to deliver to her the statement of her good moral character, when such could be obtained almost immediately, or at the outside within a space of two weeks? We repeat again that what this appellant wanted all through the negotiations for a settlement of her suit was a vindication of the charges made against her. She did not want to wait indefinitely for this—she did not want to wait longer than it was absolutely necessary. It was only right to presume that when her suit for breach of promise was

heard, if the appellee had any proof of the charges made against her, he would produce it at such trial. That then and there Frank Allen Moore and Margaret Gleason Moore and Miles C. Moore would testify or not testify to such charges. And we say again, the appellant knew that within five or six days from the time the escrow agreement was made, that the result of the trial would be such as she could or she could not go to her friends and people and say to them that the charges were untrue and malicious lies.

With these facts and circumstances surrounding and entering into the execution of the escrow agreement, what then was the understanding as to when the statement of vindication signed by Frank Allen Moore and Margaret Gleason Moore was to be delivered to appellant? We claim that such was to be delivered within two weeks. It is true, as evidenced by the letter of instruction to the Security Savings and Trust Company (Transcript of Record, page 49, the additional \$3000.00 and stipulation and release and statement therein mentioned were to be all delivered within a space of 90 days. But why was the limitation of 90 days placed upon this part of the agreement? The testimony on page 101 of the Transcript of Record clearly indicates that it was for the purpose of securing the additional \$3000.00 to be paid to appellant, and not for the purpose of carrying out any of the other terms of the agreement. It was not going to take 90 days to get the statement signed by Frank Allen Moore and wife returned to appellant. True it is that the stipulation ("Plaintiff's Exhibit 5" Transcript of Record, pages 61 and 62), entered into February 24, 1912, calling for the delivery of

such statement of Frank Allen Moore and Margaret Gleason Moore and the release by appellant, reads, in part, as follows, to-wit:

“The release herein referred to is to be delivered to A. E. Clark, and the written statement aforesaid to the aforesaid attorneys for Mary E. Cronen when said sum of \$3000.00 is paid, and upon failure to make such payment as provided for in the instructions to the escrow agent, the release is to be surrendered to said attorneys for Mary E. Cronen, and the statement to the said A. E. Clark.”
There is no question but what the additional \$3000.00

could be paid prior to the expiration of the 90 days. And as shown by the testimony there was a general understanding that such would be paid much sooner than that time, and the whole settlement completed. (Transcript of Record, page 104). But through an abundance of precaution the 90-day period was agreed upon.

Now then, the testimony adduced at the trial of this suit and cited by us in this argument, is not such as to contradict the terms of the stipulation as above referred to, but to explain the same. In other words, though the stipulation says, “The release herein referred to is to be delivered to A. E. Clark, and the written statement aforesaid to the aforesaid attorneys for Mary E. Cronen when said sum of \$3000.00 is paid, etc.,” there could have been an oral agreement or understanding that such statement was to be delivered within a period of two weeks from the execution of the escrow agreement.

Gaston v. City of Portland, 16 Oregon 255.

Campbell v. Thomas, 42 Wis. 437.

Stanton et al v. Miller et al, 58 N. Y. 202.

Or we might go a step further and ascertain the time in which this statement was to be delivered from the intention of the parties at the time of making the escrow agreement, and following the doctrine laid down in *Gaston v. City of Portland* (supra) that "the intent of the grantor must govern, and this is to be derived from all the facts, circumstances and proof," then the time in which the statement was to be delivered can be ascertained from the intent of the appellant in stipulating to release certain members of appellee's family from all claims and demands upon a consideration of obtaining this statement; and that intent is to be derived from what was said, from what was done at the time of the execution of the escrow agreement, and from what was sought to be accomplished by making such agreement. We have seen that the uppermost thing in appellant's mind in making the escrow agreement was the obtaining of this statement of vindication. In the examination at the trial of this case of Mr. John H. Stevenson, who acted as one of the attorneys for appellant at the time of making the escrow agreement, being questioned as to when the statement of Frank Allen Moore and Margaret Gleason Moore, mentioned in the stipulation ("Plaintiff's Exhibit 5," Transcript of Record, page 61), was to be delivered, said:

"Well, the only conversation I can recall now was this: I think Miss Cronen asked Mr. Clark how soon he could have back the statements by Frank Allen Moore and Margaret Gleason Moore, and I don't pretend to remember the dialogue, but what I gained from it was merely a matter of sending up there for the statements."

And being asked "Up where," replied:

“Up to Walla Walla. And that they would come right back. That is, the understanding I gained from it was, there would be no difficulty involved, or no delay, in getting these statements here, getting them signed, but whether there was any exact agreement between us as to just when they would be delivered here, my memory isn't clear.” (Transcript of Record, page 78).

The same witness being further examined by the attorney for the appellee, on the same point, in answer to the following question, viz.:

“Just one more question I forgot, with the permission of your Honor. You said a few moments ago that you didn't recall whether there was any talk or agreement with respect to the time when the statement from Frank and his wife was to be back; that is, to be back in Portland; the agreement was just as put down in writing, was it not? That that statement of Frank's, when it came here, was to go into the bank, or was to be delivered to you when the Walter Baker Moore matter was also closed up?”

testified as follows, to-wit:

“I am not prepared to say that was the exact understanding. There was a sort of feeling among us that the whole matter would be adjusted a great deal sooner than it was, and I am not prepared to say that it was understood positively among us that this was—that the Frank Allen Moore feature of it was to await the consummation of the other settlement. My understanding was, in a general way, that any time the statement of Frank Allen Moore and Margaret Gleason Moore came here, they might be exchanged for this other, but I don't know there was any positive agreement on the last.” (Transcript of Record, pages 83 and 84).

And again, being asked:

“_____ And the time to wind it (escrow agreement) up was fixed at 90 days?”

answered:

“As to Walter Baker Moore. I am not so clear as to the others. No, there was some talk at the time as to how soon we could get these statements (statements of Frank Allen Moore and Margaret Gleason Moore) back. That is the only thing that leads me to think there might be a sort of feeling that this phase of it could be concluded sooner. But I wouldn't say any positive meeting of the minds upon that point.” Transcript of Record, pages 84 and 85).

So the substances of Mr. Stevenson's testimony is that he was uncertain as to whether there was an understanding as to when the statement of Frank Allen Moore and Margaret Gleason Moore was to be delivered, but from what he heard said at the time he thought there might be a feeling that this part of the agreement was to be concluded before the expiration of the 90 days.

John A. Logan, who acted as the other attorney for appellant at the time of the execution of the agreement, was called as a witness at the trial of this suit, and being examined as to the point in question, the following colloquy between he and the attorney for appellee took place:

“Q. Was it your understanding at the time that we were to receive the release of Frank Moore and his wife and Governor Moore before we had paid the additional \$3000.00?”

"A. Well, now, it wasn't my understanding that it was to be paid over, as a matter of contract, when it was turned over, but I can see now that Miss Cronen understood it that way."

"Q. That is, you mean to say that it was her intention to turn over to us, or Frank Moore and his wife and the Governor, before we had paid her the additional \$3000.00?"

"A. The way is this: it requires a little explanation,—I wasn't there all the time while this was being dictated, but this last stipulation with reference to Frank Allen Moore,—I had a notion that the \$3000.00 was to have been paid much sooner than 90 days, but out of an abundance of caution, the 90 days was named, although you first wanted a longer time."

"Q. Yes, I wanted 120 days?"

"A. Out of an abundance of caution, 90 days was named. Miss Cronen—and there again comes the matter of money that we were looking after, and the matter of sentiment and vindication of character she was looking after—she said to you, 'Now, when can that be back?' And you said, in substance, about as soon as the mail can get back from Walla Walla, as you walked out of the room, because you said you were going away over to the Sound the next day or Monday? This was Saturday. She said, 'I want to know when that will be back? I want to know. That is what I want,' and you said two weeks that would be here, giving ample time for delayed mail."

"Q. Then it was to go in—when it returned, it was going to go into escrow in the Security Savings and Trust Company?"

"A. It was."

“Q. And was to be delivered at the same time the money was?”

“A. It was.”

“Q. I gave it as my opinion we could get it back here in a couple of weeks?”

“A. You did.”

“Q. And that notwithstanding 90 days is fixed?”

“A. Yes, because she wasn't to get the vindication without the money. You could hold that vindication without the money.” (Transcript of Record, pages 100, 101 and 102).

And while we note here that Mr. Logan said appellant was not to receive the statement of vindication until the money was paid, yet we also note that Mr. Logan remembers distinctly the conversation the appellant had with Mr. Clark relative to the returning of the statement, which conversation all went to the effect that appellant wanted the statement returned as soon as possible, as soon as the mail could bring it, and allowing for delay, within a space of two weeks.

Mr. Logan testifying further as to when the statement in question was to be delivered, said:

“At the meeting. As we were just closing the meeting, Miss Cronen was insisting all the time she wanted that (statement of Frank Allen Moore and Margaret Gleason Moore) down here in as quick a time as possible. We lawyers, I am satisfied, didn't give it the importance that she did, but I understood it was not to be given over until the money was paid over, and the money wasn't to be paid over until 90 days it came with the money, al-

though we understood the money would be here in a very short time." (Transcript of Record, page 104).

Now then what is to be considered as the time in which this statement was to be delivered? Is that time to be determined from what her attorneys understood when the escrow agreement was made, and which understanding from their own testimony they seem very much in doubt? Or is that time to be determined from what this appellant intended and which was most forcibly manifested in what she said and what she insisted upon when the agreement was made? And in this connection let us take up appellant's own testimony upon cross-examination at the trial of this case:

"Q. Are you objecting to that?" (Meaning the procuring of the statement of Frank Allen Moore and Margaret Gleason Moore within 90 days).

"A. No, I don't object to that. What I object to is that I did not get them as you promised by return mail."

"Q. What you object to is you didn't get them by return mail. Did you expect, if it got back by return mail, it would be given immediately to you?"

"A. Surely."

"Q. And the release of Frank delivered to me?"

"A. Surely."

"Q. Without the payment of the additional three thousand?"

"A. The payment of the additional three thousand had absolutely nothing to do with that—I am getting kind of mixed in my English."

In this we find appellant reiterating with precision and emphasis her understanding as to when the statement was to be returned and delivered to her.

From the testimony of the appellant and from the testimony of both Mr. Stevenson and Mr. Logan, though the testimony of the two latter is couched in uncertain terms, and from all the facts and circumstances surrounding the execution of the escrow agreement, we conclude that the time fixed for the delivery of the statement called for in the stipulation ("Plaintiff's Exhibit 5") was as soon as the same could be sent to Walla Walla, Washington, and there signed and returned, and a space of two weeks was allowed for this. This unquestionably was the testimony of the appellant, and that intention was certainly conveyed to the attorney for the appellee at the time of making the escrow agreement. The attorney for the appellee by what he represented and told appellant clearly indicated that he was aware of appellant's intention when she insisted upon an immediate return of the statement of vindication, and he gave her to understand that he would comply with that intention. It is not denied that the statement in question was not delivered to appellant or tender of delivery made to appellant within the space of two weeks from the execution of the escrow agreement. So then, if such statement was to be delivered within the space of two weeks from the execution of the escrow agreement, the non-delivery of such, or tender of delivery, on the part of the appellee constituted a breach of the contract as to the appellee. Whether or not this breach is to be taken as depriving the appellee of any right under the escrow agreement will be taken up later,

wherein **time** as being of the essence of the contract is fully discussed.

TIME AS FORMING THE ESSENCE OF THE CONTRACT.

We now take up the discussion as to whether or not the **time** within which the terms of the escrow agreement were to be performed, was of the essence of the contract. Was it essential, taking into consideration the thing sought to be accomplished by the escrow agreement, that the things therein contracted to be performed, be so performed within the time agreed upon? In other words, was it essential that the certificate of good moral character be delivered by appellee to appellant within the time agreed upon, or could such be delivered at any time after the period for delivery had expired without doing great injustice to the appellant?

Pomeroy in his special work on Specific Performance on page 453 says:

“Although, in ordinary cases, time is not essential, yet it may be, and is, essential whenever the intention of the parties, as shown by the contract, is clear that the performance of its terms should be accomplished punctually at the stipulated day it is a matter of intention, and the intention must govern.”

and on page 458 he says further:

“And in general, whenever, from the terms of the agreement, or from the nature of the subject matter, the treating time as non-essential would produce a hardship, and delay by one party in complet-

ing or in complying with a term, would necessarily subject the other party to serious injury or loss, time will be held essential."

We can imagine the facts and circumstances of no case to which the words of Mr. Pomeroy are more applicable than the case we have here under consideration.

As heretofore stated, it is contended by appellant, that the time within which the statement of Frank Allen Moore and Margaret Gleason Moore was to be delivered to her was fixed at two weeks from the execution of the escrow agreement. Following the doctrine as laid down by Mr. Pomeroy (*supra*) what then would be the effect upon appellant if such statement was not so delivered to appellant within the time agreed upon. Would she suffer any? And if she would suffer at all to what extent?

We do not care to review again all the circumstances surrounding and entering into the execution of the escrow agreement. However, we do wish to call to your attention again the object sought to be accomplished by appellant in the obtaining of the statement of vindication signed by Frank Allen Moore and Margaret Gleason Moore, and in this connection a few of the circumstances must be again recalled. Miss Cronen claimed to be and was a good woman with a character above reproach. She was educated and cultured. She was well thought of by her friends and had a high standing in her community. There was a promise of marriage existing between she and the appellee. Because the contemplated marriage between she and the appellee did not meet with the approval of certain members of the appellee's family they took it upon themselves to spread

reports charging the appellant with misconduct, unchastity and immorality. In this way they hoped to prevent the marriage, and through such they succeeded. The appellant knew these charges to be malicious lies, perhaps her dearest friends and intimate associates knew them to be untrue. But what was the judgment of all her acquaintances? What was the word passed from lips to lips throughout the community in which she lived? Here was a good woman, who in the eyes of her friends and the people of her community, was being dragged down to the depths of that fallen and degraded woman. She was looked upon as an outcast by those who did not know the truth. She was ashamed to show herself in public—she was pointed at with ridicule and contempt. That suffering which a good woman has to bear through unjust and absolutely unwarrantable charges of her misconduct and immorality is beyond words to describe. There is no suffering so hard to bear as the suffering of the mind and the heart. This was the suffering which appellant was undergoing throughout the entire negotiations for the settlement of her suit for the breach of promise; this was the suffering from which she wished to be relieved when she executed the escrow agreement. It was shown time and time again that she cared not for what money she might receive in the way of a settlement. She wanted something to show that the charges made against her were untrue. And if she was suffering from the effects of these false reports during the period in which negotiations were pending, surely she must have suffered as much, if not more, when the appellee failed to deliver to her the statement of vindication which he agreed to. She had hoped to obtain this statement at the time

agreed upon and the failure of the appellee to so deliver the same at such time only served to make the suffering of the poor woman the more intense. She anxiously waited for the appellee to make good his promise and repeatedly inquired of her attorney if such statement had been delivered. And becoming impatient and incensed because of the failure of the appellee to abide by the terms of the escrow agreement she wrote the Security Savings and Trust Company rescinding in full the escrow agreement. (Plaintiff's Exhibit 8, Transcript of Record, page 109). This letter was written three weeks after the time had expired in which delivery of the statement was to be made. Knowing that the one essential thing appellant desired to accomplish through the execution of the escrow agreement was the obtaining of the statement of vindication as soon as she could, and when she did not obtain it at the time agreed upon, was she not justified in rescinding the whole agreement? Was it just and fair to this appellant to grant the decree of specific performance compelling her to carry out the terms of the escrow agreement, when the appellee had made a breach of the most vital covenant contained in the same agreement?

In the case of *Quinn v. Roath*, 37 Conn. 16, the Court said:

“Whether specific performance of a contract shall be decreed is in a great measure dependent upon judicial discretion, exercised not arbitrarily or capriciously, but reasonably, according to the circumstances of the particular case.”

The Court in granting the decree for specific performance in the case under consideration virtually dis-

regarded the object sought to be accomplished by the execution of the escrow agreement. We ask, is it equity or justice to grant a decree in favor of one who has been at fault, and wholly disregard the suffering and hardship endured by the innocent party? It cannot be said that this appellant did not endure intense suffering and hardship through the failure of the appellee to make performance of his part of the agreement. Would it not be more just and equitable to refuse the decree for specific performance and say to this appellant that she has been subjected to great hardship and unfairness through the failure of the appellee to abide by the terms of the agreement, and because of the hardship and suffering imposed on her by appellee in failing to abide by the terms of the agreement that said appellee was not entitled to any relief in a court of equity. We feel that the facts and circumstances surrounding this suit would warrant the refusal of the decree.

In the case of *Gale & Gale v. Archer*, 42 Barbour (N. Y.) 320, suit was brought to compel the specific performance of a contract entered into between the plaintiffs and defendant on June 6, 1862, and to be completed July 1, 1862. The contract called for the exchange of property of a fluctuating value, and also involving growing crops, the care of live stock and the discontinuance of work on the farm in the middle of the harvest season by the defendant. A breach of the contract was made on the part of the plaintiffs by non-performance on the day specified, and later they brought an action in a court of equity asking for the specific performance of the contract on the part of the defendant. The Court said:

“In seeking to determine whether time is of the

essence of the contract between the parties in this action we must see what was the subject of it, and what it was that they intended to accomplish, as well as its date, and the time fixed for performance.

————— Such a contract, or rather the execution of it, cannot remain suspended in doubt for any period of time, without the most serious anxiety and detriment of the contracting party, who intends in good faith and is prepared to fulfill. And if the other party fails a specific performance cannot be enforced without injury and injustice to him who has been guilty of no laches or wrong. —————

The Court will exercise a sound and reasonable discretion, and will never grant relief thus sought unless it is entirely equitable and right, and will work no injustice to the adverse party.”

Following the doctrine laid down in the case just referred to, we ask the Court, could the execution of the escrow agreement remain suspended in doubt or uncertainty for any period, without the most serious anxiety and detriment to this appellant, who in good faith intended and was prepared to fulfill the same? Surely when she did not receive the statement of vindication at the time agreed upon she continued to labor under the most serious anxiety as to whether she ever would receive such statement. Was not her hopes of obtaining some means to partially set her aright before her people, shattered when appellee failed to produce the certificate of her good moral character at the fixed time? Was this failure not a detriment to her? We fail to see where it is not an injustice and injury to this appellant to wholly disregard the suffering and anxiety and detriment she experienced through the failure of the appellee to make delivery of the statement as agreed. We fail to see where it was equitable and just, or wherein the Court

could say that it was doing substantial justice to the parties, to compel appellant to perform her part of the contract, and at the same time absolutely disregard her hardship occasioned through the non-performance of the escrow agreement on the part of the appellee.

In concluding this phase of our argument we feel justified in saying that the thing sought to be accomplished by appellant in making the escrow agreement was the obtaining of the statement of vindication; that the circumstances surrounding the contract were such as to demand that such statement be delivered within the exact period of time agreed upon; and that that period of time was of the essence of the contract.

We take the following from Pomeroy, page 472, of his special work on Specific Performance:

“Whenever time is essential, **delay, as such,** is never taken into account; that is, the party in default does not lose his right to enforce the agreement, simply because he delayed in the performance, but because he failed to comply with its **terms literally and exactly** upon the very day when the act was required to be done according to his stipulation. If time is of the essence of the contract, then the whole agreement, with all its rights and obligations turn upon a performance at the very appointed day. ————— In short, if time is essential, the same strict rule prevails in equity as at law, and the party who has stipulated to do an act at a specified time, must do it at that time, or he loses all his remedial rights in a court of equity, as well as in a court of law.”

And because the appellee failed to make performance, of that part of the escrow agreement which was

essential, within the exact time agreed upon, we strongly contend that he was not entitled to his decree for specific performance obtained in the trial court.

**A DECREE IS ERRONEOUS IN NOT REQUIRING
THE SPECIFIC PERFORMANCE OF
THE ENTIRE CONTRACT.**

By reference to the decree granted in this case (Transcript of Record, page 38), we find the trial Court absolutely silent and making no disposition whatever of that part of the escrow agreement executed by appellant and appellee wherein appellee was to deliver the statement signed by Frank Allen Moore and Margaret Gleason Moore in exchange for a release by appellant as provided in the stipulation marked "Plaintiff Exhibit 5" (Transcript of Record, page 61).

The branch of our argument which we will consider now, involves the question of whether the decree of the trial Court was erroneous in not compelling the specific performance of the entire contract made between appellant and appellee. In this connection it is necessary to first determine just what constituted the contract between appellant and appellee. To determine this we beg the indulgence of the Court to call to its attention again that at the meeting of the attorneys and appellant on February 24, 1912, Mary E. Cronen, appellant, agreed to dismiss her suit against Walter Baker Moore, appellee, and give him a release and discharge of all claims against him in consideration of the payment of \$6000.00 and the delivery to her of a certain statement signed by appellee. At this same meeting of the attorneys and

appellant a stipulation was entered into whereby appellant agreed to release and discharge Frank Allen Moore and Margaret Gleason Moore from all claims and demands upon the delivery to her of a certain statement signed by Frank Allen Moore and Margaret Gleason Moore. Now the question that confronts us here is whether or not all matters agreed upon and all things done at this meeting of the attorneys and appellant in perfecting the settlement agreement constituted one and the same contract. In other words, do the things agreed to be done as evidenced by Plaintiff's Exhibits 1 to 4, inclusive (Transcript of Record, pages 49, 50, 51 and 52, respectively), and the things agreed to be done as evidenced by Plaintiff's Exhibits 5 and 6 (Transcript of Record, pages 61, 62 and 63, respectively), constitute a contract of entirety? Are they to be read together and considered as one?

It is our contention that the settlement agreed upon between appellant and appellee was one which included and embodied all those things agreed to be done as set forth in Plaintiff's Exhibits 1 to 6, inclusive.

The meeting of the attorneys and appellant on February 24, 1912, was called for the sole purpose of effecting a settlement of the controversy between appellant and appellee. In bringing about this settlement the appellant had a right to demand of the appellee anything she saw fit, and the appellee had the same right to demand of the appellant anything he saw fit. Their demands could relate to the subject matter of the controversy, or they could not. They could be material and essential demands, or they could be mere fancy and

whims. But when either party, in order to effect the settlement, granted to the other his or her demand, whether such relate to the subject matter or not, or whether it be material or mere fancy, then such thing granted and agreed to formed a part of the settlement. The agreement to settle the controversy includes everything granted and agreed to in order to accomplish the settlement.

True it is Miss Cronen had only sued Walter Baker Moore, and yet when she was making the settlement with appellee she demanded things from parties she had not sued namely, the statement from Frank Allen Moore and Margaret Gleason Moore. And this the appellee agreed to furnish. (Transcript of Record, pages 64 and 65). In this instance the thing demanded by appellant and agreed to by appellee was such as pertained to the subject matter of the controversy. It was a retraction of untrue statements made about her, which, if true, would have served as a defense to her suit for breach of promise against the appellee.

As to those instruments which relate to the same subject matter we quote *Cyclopedia of Law and Procedure*, Vol. 9, pages 580 and 581:

“Where several instruments are made as part of one transaction, they will be read together, and each will be construed with reference to the other. Thus where two or more written instruments are executed on the same day, relate to the same subject matter, and one refers to the other, the presumption is that they evidence but a single contract.”

Many cases are cited in suport of this doctrine. In the case of Bean et al v. Lawham, 7 Oregon 423, the reviewing Court said:

“It is unnecessary for us to consider what would be the legal effect of the first agreement, standing by itself, as between the parties to it. The two contracts being contemporaneous and relating to the same subject matter, must be construed together as constituting but one agreement.”

In the case we have under consideration there were several instruments executed and agreed to be executed, but each had a bearing upon the same transaction. Each had for its purpose the accomplishment of the settlement of the controversy between appellant and appellee. There was a connecting link between them all—each had reference to the other, and especially did the stipulation agreeing to deliver the statement signed by Frank Allen Moore and Margaret Gleason Moore to appellant, refer to the other matters concluded that day,—for we find such stipulation reciting that the statement therein agreed to be given should be delivered when the additional money was paid. And yet the decree of the Court absolutely fails to take any notice of this part of the agreement. The decree cuts the contract in two—one branch is divorced from the other and given no consideration whatever. We fail to see wherein the agreement to deliver the statement signed by Frank Allen Moore and Margaret Gleason Moore was not just as much a part of the contract of settlement as was the payment of the \$6000.00. The appellant demanded such all through the negotiations for the settlement of the controversy between she and the appellee. (Transcript of Record, page 96). She demanded it the

day the settlement was agreed to before she would consent to a settlement. Her demand was one which arose out of the subject matter then being disposed of, and in order to perfect a settlement and dispose of the matter the appellee acceded and agreed to her demand. With these facts, together with the instruments themselves, we fail to see where the contract for the settlement of the controversy between appellant and appellee did not include the agreement to deliver the statement of vindication signed by Frank Allen Moore and Margaret Gleason Moore in exchange for appellant's release. We claim that the decree granted in this case was erroneous because it failed to decree a specific performance of the entire contract. It is a well settled principal of equity that a decree compelling specific performance must conform to the contract.

Bennett v. Giles, 111 Ill. App. 428.

Freeburgh v. Lamoureux, 15 Wyo. 22.

26 Am. & Eng. Enc. of Law, 65-66.

20 Enc. Pleading & Practice, 496.

Giplin v. Watts, 1 Colo. 479.

The decree must be such as will enforce the contract in all its terms and conditions. If the decree fails to make disposition of the entire contract, then the Court stands in the position of making a new contract between the parties when it takes no notice of terms embodied in the original agreement. No Court has the power to make a new contract between the parties, and yet in this case it does make such a contract when it loses sight of material covenants contained in the original agreement.

It might be said that the decree in this case enforced the terms of the contract as set forth in appellee's complaint—but it is most probable that a complaint in a case of this nature will set forth a contract which is most favorable to the complaining party, and in the case under consideration we feel that such was the aim of the appellee. However, the Court is not bound by what the complaint may set up as the contract, for in *Thompson v. Hawley*, 14 Oregon 199, the Court said:

“In a suit for specific performance the defendant has a right to plead in his answer, as new matter, a contract different from the one alleged in the complaint, and the Court will then ascertain from the evidence which was the real contract.”

The answer of the appellant to appellee's complaint, alleged, as new matter, but as a part of the original contract, the agreement to deliver the statement of Frank Allen Moore and Margaret Gleason Moore in exchange for her release of all claims against them. The complaint failed to make any mention of this part of the agreement, but having established that such was a part of the original contract, and having also established that the appellant had a right to set such up in her answer, was she then entitled to a decree enforcing her version of the contract? The Supreme Court of the State of Oregon has passed directly on this question, in *Thompson v. Hawley* (*supra*), wherein it said that the defendant may have specific performance of the version of the contract as set up and proved.

See also:

Garrett v. Goff, 61 W. Va. 221.

Bradford v. Union Bank of Tennessee, 13 How.
(N. Y.) 169.

In concluding our argument we feel that in all justice and equity the trial Court should have refused the decree granted herein for no equity shown on the part of the appellee, when it was shown that the appellee had failed to carry out the essential term of the contract within the time prescribed by such contract.

In addition the decree as granted was erroneous when it failed to provide for the specific performance of the entire contract as set up and proved.

For the foregoing reasons, we respectfully submit that the decree of the lower Court should be reversed and the complaint dismissed.

Respectfully submitted,

STOTT & COLLIER, and
J. L. HOPE,

Attorneys for Appellant.

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IN THE

United States Circuit Court
of Appeals

NINTH DISTRICT

MARY E. CRONEN,
Appellant

VS.

WALTER BAKER MOORE,
Appellee.

BRIEF OF APPELLEE

Upon Appeal from the United States District Court for
the District of Oregon.

HON. R. S. BEAN, Judge

STATEMENT.

This is a suit in equity brought by the appellee against the appellant to compel the delivery to appellee of certain papers deposited in escrow with the Security Savings & Trust Com-

pany, of Portland, Oregon. The Security Savings & Trust Company was made a defendant but made no appearance in the suit. The papers were deposited in escrow in connection with a settlement between appellant and appellee of an action at law pending in the Circuit Court of the United States for the District of Oregon. The bill in equity may be found on pages 1 et seq of the transcript of record. We feel that it would be profitable in this statement to give a somewhat detailed history of the circumstances leading up to the filing of the bill in equity.

In May, 1911, Mary E. Cronen, appellant here, brought an action at law in the Circuit Court of the State of Oregon, for Multnomah County, against Walter Baker Moore, appellee. The action was removed to the Circuit Court of the United States. This law action was brought to recover damages for the alleged breach of a marriage contract. In the law action the defendant interposed an answer in the nature of a general denial. A copy of the complaint in the law action is attached to the bill in equity as Exhibit "A" and may be found on pages 20 et seq. of the transcript. A copy of the answer in the law action is likewise attached to the bill in equity as Exhibit "B" and may be found on page 24 of the transcript. In the

law action John F. Logan and John H. Stevenson, of Portland, Oregon, were the attorneys for Mary E. Cronen, and A. E. Clark of Portland, Oregon, was the attorney for Walter Baker Moore. (Pp. 42 and 43 trans.) The matter of a settlement of the case had been the subject of negotiations between the attorneys for the respective parties from about the time the law action was brought until the final settlement was agreed upon, according to the testimony of both Mr. Stevenson and Mr. Logan. (Pp. 72, 87, 88 and 89). Finally on February 24, 1912, a settlement was agreed upon. At that time it was agreed that Walter Baker Moore should pay to Mary E. Cronen the sum of \$6000.00 in settlement of the law action, \$3000.00 to be paid in cash and \$3000.00 within 90 days from February 24, 1912. To effectuate the settlement a stipulation was signed in the law action by the attorneys for the respective parties dismissing the law action upon the merits without costs or disbursements to either party, an instrument was signed by Mary E. Cronen releasing and discharging Walter Baker Moore from all claims and demands whatsoever, and there was likewise signed a statement by Walter Baker Moore certifying to the good character of Miss Cronen. These papers are copied into the record at pages 49, 50, 51 and 52 of

the transcript. Inasmuch as \$3000.00 of the stipulated amount was not to be paid at once it was agreed that the stipulation for dismissal, the release signed by Miss Cronen and the certificate of good character, so called, signed by Walter Baker Moore, should be deposited in escrow with the Security Savings & Trust Company, and thereupon the following escrow agreement was signed:

“Portland, Ore., Feb. 24, 1912.

“Security Savings & Trust Company,

“City.

“Gentlemen: There is this day deposited with you the following papers:

“(1) Stipulation for dismissal of the case of Mary E. Cronen v. Walter Baker Moore, now pending in the District Court of the United States for the District of Oregon.

“(2) Release and discharge of Walter Baker Moore of all claims and demands of whatsoever nature, signed by Mary E. Cronen.

“(3) Statement signed by Walter Baker Moore, certifying among other things, of the high moral character of Miss Cronen.

“Settlement of all matters and things between these parties has been agreed upon, and the sum of Three Thousand Dollars has been paid. An additional

Three Thousand Dollars is to be paid within ninety days from this date. Upon the payment of such sum to you, to be paid to John H. Stevenson, Attorney, or to his order, you are to deliver to A. E. Clark, Attorney for Walter Baker Moore, the stipulation and the release above mentioned, and you are to deliver to John H. Stevenson, attorney for Miss Cronen, the statement above mentioned, signed by Walter Baker Moore.

"In the event said sum of Three Thousand Dollars is not paid within the ninety days aforesaid, the escrow shall terminate, and the said stipulation and the said release shall be delivered to John H. Stevenson, and the said statement to A. E. Clark.

"Yours truly,

"A. E. CLARK,

"Attorney for Walter Baker Moore.

"JOHN. H. STEVENSON,

"Attorney for Mary E. Cronen."

These papers were all signed in the office of the attorneys for Miss Cronen, with the exception of the certificate signed by Walter Baker Moore, which had been signed by him in San Francisco and forwarded to Portland to be used in making the settlement. The attorney representing Mr. Moore did not have the first payment of \$3000.00 with him at the time and

so all of the papers were left in the custody of Mr. Stevenson, attorney for Miss Cronen, upon the understanding that they were to be deposited with the Security Savings & Trust Company when the initial payment of \$3000.00 was made. Within a day or two this sum was paid and the papers deposited in escrow. Touching the circumstances surrounding the execution of these papers, Mr. Stevenson, one of the attorneys for the appellant in the settlement, testified:

Q. Now, do you recall the circumstances of a settlement being arrived at in February, 1912?

A. Yes, sir. I was—I took part in it. I negotiated the settlement.

Q. And where were the papers relating to that settlement signed?

A. In Mr. Logan's and my office.

Q. And were some of those prepared in your office that day—during the course of the negotiations?

A. They were, yes.

Q. And who were present when the negotiations occurred, and when the papers were signed?

A. Yourself and Miss Cronen, Mr. Logan and myself.

Q. All in the same room?

A. Yes, sir.

Q. Who were there representing Miss Cronen?

A. Mr. Logan and myself.

Q. And I was in the midst of all you alone?

A. Yes, sir.

MR. CLARK: Probably the orderly way would be to have shown that these papers were produced by the Security Savings & Trust Company, but I will show that shortly, your Honor.

Q. I call your attention to a paper under date of February 24, 1912, addressed to the Security Savings & Trust Company, and purporting to have been signed by myself as attorney for Walter Baker Moore, and by John H. Stevenson as attorney for Mary E. Cronen, and I will ask you whether or not you signed that paper?

A. I did, yes, sir.

Q. And state whether or not that paper was signed in your office upon the 24th day of February?

A. It was.

Q. And in whose presence?

A. And in the presence of Miss Cronen, yourself, Mr. Logan and myself.

Q. State whether or not Miss Cronen was

fully advised by you and Mr. Logan of the contents of that paper?

A. As far as I know, she was.

Q. She was present during the entire negotiations?

A. She was at that time.

Q. And you understood what the paper contained?

A. I did.

Q. And you were representing her as her attorney?

A. Yes, sir.

(Pp. 43, 44 and 45, Transcript).

* * * * *

Q. I also call your attention, Mr. Stevenson, to what purports to be a stipulation for a dismissal of the law action referred to, and purporting to be signed by you and by myself representing the plaintiff and defendant.

A. It is such a stipulation, and I so signed.

Q. Signed by you, and by myself?

A. Yes.

Q. And when was that signed?

A. At the same time, the 24th of February, this year.

Q. And in the presence of Miss Cronen?

A. Same parties.

Q. Did you understand fully what you were doing when you signed the stipulation?

A. I think so.

Q. And do you know whether Mr. Logan also was fully cognizant of the contents and character of the stipulation?

A. As far as I am advised, he was.

Q. And state whether or not the matter of the stipulation and its force and effect was discussed in the presence of Miss Cronen?

A. I believe so.

MR. CLARK: I offer the stipulation in evidence. Marked "Plaintiff's Exhibit 2."

Q. I call your attention now to another paper purporting to be a release signed by Mary E. Cronen, witnessed by yourself and myself.

A. That is such a release, and is signed by yourself and myself.

Q. As witnesses?

A. As witnesses.

Q. And by Mary E. Cronen?

A. Yes, sir.

Q. Where was that instrument signed?

A. In my office on the 24th day of February, 1912.

Q. State whether or not this instrument was read to, or read by Miss Cronen, before she signed it?

A. Yes.

Q. Do you remember any incident in con-

nection with the language used in this release, which calls to your mind the fact that it was fully discussed at the time?

A. The only thing I recall now is the discussion of the breadth and scope of the release, as to whether or not it had the effect of discharging Walter Baker Moore, and his heirs alone, or whether it also had the effect of discharging his family—relations.

Q. And that was a discussion that arose in the presence of Miss Cronen?

A. Yes.

Q. And before the release was signed?

A. Yes.

Q. And it was the subject of discussion, was it not, between Mr. Logan and yourself, and Miss Cronen and myself?

A. It was.

Q. With respect to the scope of the release?

A. Yes, sir.

Q. After which the release was signed?

A. That is correct.

MR. CLARK: We offer in evidence the release. Marked "Plaintiff's Exhibit 3."

Q. I show you another paper, and ask you whether or not that was produced at the time of the settlement, and made a part of the papers that were to be deposited in escrow?

A. It was.

Q. Do you remember by whom it was produced?

A. By you.

Q. Do you remember whether or not we had taken two or three weeks to get that in just the form that would be satisfactory to Miss Cronen?

A. Some considerable time, I recall.

Q. And do you recall the form which you finally sent over was the form that was finally adopted and signed?

A. I believe this is substantially, if not exactly, the form that I sent over.

MR. CLARK: The paper last referred to by the witness is offered in evidence. Marked "Plaintiff's Exhibit 4."

Q. I note on this paper, following the signature of Walter Baker Moore, is this "I hereby certify that the above signature is that of Walter Baker Moore," dated February 24, 1912, and signed by me. Do you remember how, in the course of the negotiations there, I came to put that certificate on?

A. I think there was a request.

Q. Do you remember who made the request?

A. I believe Miss Cronen mentioned it, and

I believe I asked you to certify it. You certified—verified the signature.

Q. In other words, you were taking—in the course of that settlement, you weren't taking chances as to whether or not that was Walter Baker Moore's signature?

A. I think we wanted it verified.

Q. And you were extremely careful, were you not, in all the details of the negotiation?

A. We tried to be.

(Pp. 45, 46, 47, 48 and 49, Transcript).

Q. Now, Mr. Stevenson, after these papers had been agreed upon and signed, what was done with them that day?

A. They were left with me until the following day.

Q. What for?

A. Until you could make arrangements to deposit the money in escrow, to pay over the—

Q. First three thousand dollars?

A. (Continuing) First three thousand dollars.

Q. I didn't have the \$3,000 with me at that time. Do you remember how I happened to go over to your office that day in connection with this matter.

A. I think I asked you to come over, as I recall now.

Q. The amount of the settlement had been

a subject of considerable negotiation, had it not?

A. Yes.

Q. For a long time. Is it not a fact that your office insisted on having a minimum of \$7500?

A. Why, I don't recall the minimum.

Q. You started with something considerably bigger than that, some thirty or forty thousand, but you eventually got down to what you declared to be an irreducible minimum of \$7500. Do you recall that?

A. I don't recall the irreducible minimum, or we would probably adhered to it.

Q. Well, I understand; but reduced to a minimum, and I got up to \$5,000, and there we hung until in February, 1912. Do you remember that?

A. I don't recall, Mr. Clark, the exact time when we reached the \$6000 stage, but it was some little time before the papers were signed.

Q. More than two or three weeks?

A. Well, it was probably two or three weeks.

Q. Probably two or three weeks?

A. Somewhere along there.

Q. Then the question arose as to the form of this retraction of Walter Baker Moore?

A. Yes.

Q. And I drew that, and you sent it back to me with these lead pencil notations, and was finally signed in the exact form as corrected by you.

A. That is not the form that was finally adopted.

Q. That is the form that was finally signed?

A. No.

Q. Isn't it?

A. No.

Q. Are those your lead pencil corrections?

A. These are, yes, but this is not the form that was finally signed. For instance, the matter here referring to the measure of damages, if I recall, is not in the certificate as signed, and the matter referring to the above entitled court.

Q. Now, let's read them, and see if the one you sent back to me as corrected, isn't the one as finally signed: "Whereas, as there is now pending in the above entitled court, an action by Mary E. Cronen, against the undersigned to recover damages for breach of a marriage contract, and whereas, the measure of damages in said action has been determined and adjusted—"

A. I guess you are right.

Q. (Continuing) "Therefore, this declara-

tion is by me made voluntarily." As a matter of fact, Mr. Stevenson, I took the form you sent, and took it down and had it signed.

A. I know, but I had forgotten that was the form.

Q. You remember a good deal of discussion between you and your client, and you and me as to the form?

A. Yes, a great deal.

Q. And I finally adopted with great reluctance the form you and your client agreed upon?

A. I remember, but I had forgotten that was the form. I see now it is.

Q. When these papers were all signed, including this certificate of Mr. Moore, I left them all with you?

A. Yes, sir.

Q. Until such time as the \$3,000 was paid—the first \$3,000?

A. Yes, sir.

Q. Do you remember why they were left with you that day?

A. Well, I presume they were left with me until such time as you could pay the initial \$3,000.

Q. Yes, but my paper and yours were all left in your custody?

A. Yes, all.

Q. Do you remember Miss Cronen saying she rather have all the papers remain with her attorney until the \$3,000 was paid?

A. I don't recall that.

Q. Anyway, they were left there?

A. They were left there, that is true.

Q. A day or two later, do you recall my telephoning you to meet me at the Security Savings & Trust, and I would pay the \$3,000?

A. The next day.

Q. The next day, and to bring the papers with you?

A. Yes, sir.

Q. What papers did you bring with you?

A. All the papers that are in escrow.

Q. State whether or not there was at that time deposited in escrow with the Security Savings & Trust Company the papers introduced in evidence.

A. They were deposited.

Q. You were there at the time?

A. Yes, sir.

Q. Did I pay you for Miss Cronen the sum of \$3,000 on that day?

A. Yes, sir.

Q. And that was taken and received, and accounted for to Miss Cronen?

A. Yes, sir.

Q. And that has been kept, has it not, as far as you know?

A. As far as I know anything about.

Q. As far as you know, no part of it has ever been returned, or offered to have been returned?

A. Not as far as I know.

Q. It was paid over to, and accounted for, to Miss Cronen?

A. It was.

Q. Now, I will ask you again if, as far as you are concerned, you had a full and complete understanding of the contents and nature of the papers which were signed upon the day of the settlement?

A. I did have.

Q. And understood exactly what was going on?

A. Yes, sir.

Q. And state whether or not during the entire discussion of the case, and in the discussion of all these papers, Miss Cronen was present in the room?

A. She was.

Q. And state whether or not Mr. Logan, your associate, was present a good share of the time, and participated in the discussion and in the council with respect to the character of these papers?

A. I was all the time; Mr. Logan was there the greater part of the time.

(Pp. 53, 54, 55, 56, 57 and 58, Transcript).

It thus appeared beyond all reasonable dispute that a settlement was arrived at, that the papers which were signed in the office of Logan and Stevenson, were fully understood by all of the parties, that these papers were deposited in escrow pursuant to written instructions to the escrow agent, and that the sum of \$3,000.00 was paid upon the settlement, which amount was received and has been retained by Miss Cronen.

Mr. Abercrombie, attorney for the trust department of the Security Savings & Trust Company, called as a witness, testified that the papers were deposited in escrow either on February 24th or February 26th, and at that time a check was drawn to the order of A. E. Clark, attorney for Walter Baker Moore, for the sum of \$3,000.00, that this check was immediately indorsed over to John H. Stevenson and by him cashed. This was the initial payment upon the settlement. Mr. Abercrombie further testified that on May 6, 1912, an additional \$3,000.00 was deposited with the Security Savings & Trust Company, in behalf of Walter Baker Moore, with instructions to pay the same over to Mr. Logan or Mr. Stevenson, as attorneys for Miss

Cronen. Upon the trial, draft for this amount, \$3,000.00 was brought into court by the Security Savings & Trust Company, tendered and deposited with the clerk under the order of the Court. (Pp. 106, 107, 108 and 109, Transcript of Record).

This additional sum of \$3,000.00 according to the escrow agreement was to be deposited within 90 days after February 24, 1912, hence the deposit was made long before the expiration of the stipulated period. It appears from the evidence of Mr. Stevenson that he and Mr. Logan were notified about May 8, 1912, that the money had been paid into the Security Savings & Trust Company, and a request was then made that settlement be carried out by a delivery of the papers to the respective parties. (Pp. 58 and 59). In the meantime, however, and under date of April 4, 1912, Miss Cronen had served upon the Security Savings & Trust Company a written notice that she had rescinded all agreements with respect to the settlement, and notified the trust company not to deliver any of the papers in escrow to any of the parties to the settlement upon the penalty of being held for damages in the sum of \$100,000.00. (Pp. 109, 110, Transcript). From the time notice was served upon the Security Savings & Trust Company, it took the position that

it would not make delivery of any of the papers until the respective rights of the parties had been adjudicated in court. (Pp. 110, 111).

The notice, which appears to be drawn in excellent form, with careful regard of legal formalities, was prepared by Miss Cronen herself without the assistance of anyone, and indicates a degree of ability and familiarity with legal forms quite in contrast with her claims upon the trial that she did not understand the matter of the settlement made in the office of her lawyers on February 24, 1912, or the scope and effect of the papers signed at that time. (Pp. 135, 136, Transcript).

Up to this time the situation may be summarized thus:

A settlement had been agreed upon and papers effectuating the same had been deposited in escrow; \$3,000.00 had been paid in cash upon the settlement and received by Miss Cronen and retained by her; the remaining \$3,000.00 had been paid into the Trust Company pursuant to the terms of the escrow agreement, on May 6, 1912; the escrow agent would not deliver the release of Walter Baker Moore, or the stipulation dismissing the law action, to the appellee, or his attorney, because of the notice served upon it by Miss Cronen, and Miss Cronen and her attorneys would not withdraw the notice not-

withstanding the former had received \$3,000.00 of the appellee's money.

In this state of the case appellee filed his bill in equity, setting up the foregoing facts, and praying for a decree directing the delivery up of the papers deposited in escrow in accordance with the terms of the escrow agreement, and a perpetual injunction against the further prosecution of the law action. The answer interposed to the bill in equity may be found on pages 30, et seq. of the transcript. It is difficult to spell out of it just what, if any, issues were sought to be tendered. There was an apparent attempt to deny the details of the settlement of February 24, 1912, although such settlement is established by un-impeachable documentary evidence, and there is no way of ascertaining from the confused mass of verbage contained in the answer just what defense is sought to be interposed. It is but fair to say that the answer was not drawn, nor was the case tried in the lower Court, by the very able counsel who represent appellant on this appeal.

Upon a hearing the Circuit Court entered its decree in accordance with the prayer in the bill and from such decree this appeal is prosecuted.

At the time the papers were signed, preparatory to being deposited in escrow, settling the law action against Walter Baker Moore,

certain other papers were prepared and signed concerning which a few words of explanation may not be out of place. Miss Cronen wanted some certificate from other members of the family to the effect that she was, so far as they knew, a woman of good character and when she asked for such a paper, the attorney for Walter Baker Moore suggested that she sign a release of these parties who were to sign such a statement, inasmuch as Miss Cronen seemed to be entertaining the mistaken notion, or at least claimed to believe, that they had made statements derogatory to her character. These papers are copied into the record on pages 61, 62 and 63. They consist of a release of Frank Allen Moore, Margaret Gleason Moore and Miles C. Moore, signed by Miss Cronen, and a stipulation in the form of an escrow agreement signed by Attorneys John H. Stevenson and A. E. Clark. The escrow agreement provides in substance that the release last mentioned, signed by Miss Cronen, should be deposited in escrow with the Security Savings & Trust Company, that upon delivery to the trust company of a written statement signed by Frank Allen Moore and Margaret Gleason Moore for delivery to the attorneys for Miss Cronen and in the form set out in the escrow agreement, the release was to be delivered to A. E. Clark.

This was an entirely separate matter, it being understood, according to the testimony of Mr. Logan that the settlement of the law action against Walter Baker Moore was absolute. (P. 94, Transcript.) However, as bearing upon certain allegations in the answer filed by Miss Cronen to the bill in equity, the attention of the court is called to the fact that these latter papers were all prepared in the office of Logan and Stevenson and dictated to their stenographer in the presence of Miss Cronen, the release signed by her at the time and the escrow agreement signed likewise at the time and in her presence. (Pp. 60 to 67). These papers were also left with Mr. Stevenson in escrow and were so deposited. (Pp. 72, 73, 74, 75, 76, 77, 78 and 79). See also the evidence of Mr. Logan. (Pp. 96, 97, 98, 100, 101, 102, 103 and 105).

Called as a witness in her own behalf Miss Cronen, upon cross examination, fully admitted that the papers were all gone over with her and that she understood them. (Pp. 125, 126, 127, 131 and 132). Further that she received the \$3,000.00 paid within a day or two after the settlement was agreed upon and has spent the money. (Pp. 142, 143). The whole trouble with Miss Cronen seems to be summed up in this testimony given by her:

Q. What is it you say you haven't got you think you should get in any matters?

A. The thing I didn't get was the vindication from Frank Allan Moore, or his wife, at the time or any time within ninety days.

Q. Do you object to the form of the vindication?

A. I don't, no.

Q. You don't?

A. It is a very good form.

Q. You notified the bank that you had rescinded everything on April 4th?

A. Yes.

Q. Now you say what you really object to is that you didn't get that vindication within ninety days.

A. No, I didn't say anything of the kind, I said by return mail, within a few days. Don't think you can tie me up like that for my heart is in this case, and you can't.

Q. Let's go back and see. Let's read the record.

COURT: You said ninety days; that is what you said. Perhaps you didn't mean it. If you didn't mean it, correct it.

A. What I meant to say is, you did not procure this within ninety days.

Q. Didn't procure within ninety days?

A. No.

Q. Are you objecting to that?

A. No, I don't object to that. What I object to is I did not get them as you promised by return mail.

Q. What you object to is you didn't get them by return mail. Did you expect, if it got back by return mail, it would be given immediately to you?

A. Surely.

Q. And the release of Frank delivered to me?

A. Surely.

Q. Without payment of the additional three thousand?

A. The payment of the additional three thousand had absolutely nothing to do with that—I am getting kind of mixed in my English.

Q. I don't want to mix you up.

A. The thing is this: On the payment of that three thousand dollars, you were entitled to the release that was lying in escrow, don't you see?

Q. I see.

A. Because that other vindication got accidentally put in there, it was tied up for ninety days. I objected to that at the time.

Q. I wanted one hundred and twenty; you wanted sixty, and we compromised on ninety.

A. I don't know anything about that. I left that to Mr. Logan.

Q. Let's get back to the Frank A. Moore matter. Then, as I understand it, getting right down now, you have eliminated a lot of these matters in controversy, apparently. The only thing then that you take exception to is this, apparently, that the Frank A. Moore and wife vindication did not come back as soon as you thought it should. That is, it didn't come back by return mail.

A. Well, the fact that they all laughed around the country, and Mr. Lee told it broadly and the boys told it broadly that they got a "cheap settlement because they had the goods on her." And every little while I went to the office. "Have you heard?" "No, not yet, but be patient, they will come. They will come." Now, on the 24th day of May, Mr. Logan asked me to come down to the office.

Q. Mr. Logan?

A. Mr. Logan in May. That was Saturday afternoon; the ninety days were up and he says: "The only way for you to get the vindication out of escrow is to go down and release the bank from that." I said "I am not going to take that. I don't want that." I told him what had been said about me; the vilest things that had been said about any woman, after

they had all promised, and you had promised as their attorney.”

(Pp. 143, 144, 145 and 146, Transcript).

* * * * *

Q. What are you objecting to?

A. I am objecting to the fact that it was not turned over to me and I was not able to vindicate myself, and put those things on record and refer my friends and people to those things at the time that settlement was made.

Q. You say time was not of any particular consequence to you but what you want is the vindication.

A. I see I have to be very particular what I say here.

Q. What I want is the fact, Miss Cronen.

A. The fact is this: I object to your not delivering this by return mail as you said you would, or within a few days afterwards. That would have been all right. Not wait until the 29th day of February. I wanted to have this on record when my attorneys came to the courtroom and said the case was called off. I wanted to show that as a part of my statement, instead of their going around the country saying they got a cheap settlement. “We had the goods on her and she had to do that.” You haven’t got the goods on me.

(Pp. 148, 149, Transcript).

Of course the fact is, that the certificate to be signed by Frank Allan Moore and his wife was not to be delivered except upon payment of the remaining \$3,000.00 because Miss Cronen would not sign her release of Frank and his wife unless she got the remaining \$3,000.00. Mr. Logan explains the mental attitude of Miss Cronen with respect to the time of the delivery of the Frank Allan Moore and wife certificate by saying that there was such discussion at the time to the effect that the paper could be gotten back within a couple of weeks and delivered forthwith and entirely independent of the Walter Baker Moore matter, but frankly admits that it was agreed at the time out of the abundance of caution that 90 days likewise should be allowed for this. (Pp. 150, 151, 152, 153, 154 and 155).

With respect to the certificate of good character to be signed by Frank Allan Moore and his wife, it is sufficient to say that such a statement was prepared and signed, and in the form fixed by the escrow agreement entered into with respect to such certificate and the release of Frank Allan Moore, his wife, and Miles C. Moore, which escrow agreement, as heretofore noted, is copied into the record on pages 61 and 62; and upon the trial of this cause, such certificate was produced and delivery thereof ten-

dered in accordance with such escrow agreement. (Page 113, Transcript).

POINTS AND AUTHORITIES.

I.

When parties to a contract have reduced the terms of their agreement to writing, such writing will be conclusively presumed to contain all of the terms and conditions of the contract.

Talmadge v. Hooper, 37 Ore. 512.

Langell v. Langell, 17 Or. 229.

Hindman v. Edgar, 24 Or. 583.

Edgar v. Golden, 36 Or. 450.

Milos v. Covacevich, 40 Or. 242.

Godkin v. Monahan, 83 Fed. 119.

DeWitt v. Berry, 134 U. S. 306, 33 Law.
Ed. 896.

Burnes v. Scott, 117 U. S. 582, 29 Law
Ed. 992.

II.

Neither party to an escrow contract can rescind nor modify the terms thereof without the consent of the other.

Tharaldson v. Everts, 87 Minn. 168; 91
N. W. 468.

Cannon v. Handley et al, 72 Cal. 133; 13
Pac. 318.

McDonald v. Huff, 77 Cal. 279; 19 Pac.
499.

Gammon v. Bunnell, 22 Utah 421; 64 Pac.
959.

Grove v. Jennings, 46 Kan. 366; 26 Pac. 739.

Davis v. Clark, 58 Kan. 100; 48 Pac. 565.

Bury v. Young, 98 Cal. 446; 33 Pac. 338.

Guild v. Althouse, 71 Kan. 604; 81 Pac. 172.

Schmidt v. Deegan, 69 Wis. 300; 34 N. W. 85.

Fred v. Fred, 50 Atl. 776 (New Jersey Chancery 1901).

16 Cyc. 570.

11 American & Englis Ency., 2nd Ed. page 344, point 3.

Vol. 19 Century Digest Column 1818, Sec. 10.

Volume 8 Decennial. Digest, Escrows Sec 8 (2).

III.

This suit is maintainable to procure the delivery of papers to which complainant is entitled.

Fred v. Fred, 50 Atl. 776.

Mechanic's Natl. Bank v. Roughead, 78 N. Y. Supp. 800.

Clark v. White, 12 Peter's 178-200, 9 Lawyers Ed. 1046.

Baum's Appeal, 113 Penn. St. 58; 4 Atl. 461.

IV.

This suit is also maintainable as ancillary to the law action brought by Mary E. Cronen against Walter Baker Moore.

Dewey v. Coal Co., 123 U. S. 329; 31 Law.
Ed. 179.

South Penn. Oil Co. v. Oil Co., 140 Fed.
507.

Leigh v. Manufacturing Co., 127 Fed.
990.

The Cortes Co. v. Thanhauser, 9 Fed. 226.

Claflin v. McDermott, 12 Fed. 375.

ARGUMENT.**I.**

The present suit concerns only to the settlement of the law action of Cronen v. Moore and the papers relating thereto executed and placed in escrow. We have seen from an examination of the evidence that a settlement of the law action was finally agreed to upon February 24, 1912. Every detail of that settlement was then agreed upon and embodied in the written memorials of the parties. The final details of the settlement were fixed and the execution of the papers took place in the office of the attorneys for Miss Cronen and in her presence. At that time there was signed a stipulation providing for a dismissal of the law action. (Exhibit 2, p. 50, Transcript). At that time and place Miss Cronen executed a release of Mr. Walter Baker Moore which is in evidence as Exhibit 3, page 51, Transcript. At the same time there was produced a certificate signed by Walter Baker Moore which is in evidence. (P. 52, Transcript). This certificate is in the exact form previously approved by Mr. Stevenson, attorney for Miss Cronen. (P. 55, Transcript). Great care was used apparently by the attorneys for Miss Cronen to see that she understood everything that was done and the scope and

effect of every paper that was included in the settlement. (Pp. 46, 47, 48 and 56, 57 and 72, 73 and 91, 92, 93, 94 and 95, Transcript). The settlement provided for the payment of \$3,000.-00 and the deposit of these papers in escrow to be delivered upon payment to the escrow agent of the remaining sum of \$3,000.00, which was to be done within 90 days. An escrow agreement was prepared and signed at the same time, which is in evidence. (Pp. 49 and 50, Transcript).

An examination of this escrow agreement will show that it was addressed to the Security Savings & Trust Company, selected by the parties to act as escrow agent. It recites that there is deposited with such company stipulation for the dismissal of the law action of Cronen v. Moore, also the release and discharge of Walter Baker Moore signed by Miss Cronen and also the statement or certificate signed by Mr. Moore. These are the only papers referred to in this escrow agreement and are all the papers appertaining to the settlement of the law action. The escrow agreement further recites that the settlement of all matters and things between the parties has been agreed upon, \$3,000.00 in cash has been paid, and the balance is to be paid within 90 days; that upon the payment of the deferred installments of \$3,000.00 to the Se-

curity Savings & Trust Company, to be paid over to Mr. Stevenson, attorney for Miss Cronen, the stipulation for dismissal and release of Mr. Moore were to be delivered to the attorney for Mr. Moore, and the statement or certificate signed by Mr. Moore was to be delivered to the attorneys for Miss Cronen. It is further provided that in the event the additional sum of \$3,000.00 is not paid within the 90-day period fixed the escrow agreement should terminate and the stipulation for dismissal and the release should be returned to the attorneys for Miss Cronen and the certificate signed by Mr. Moore should be returned to his attorney. An examination of these papers will show that nothing was left uncertain and that the parties made a contract complete in every detail. In their brief counsel for appellant discuss at some length, and cite cases to, the proposition that a contract, whether in the nature of an escrow agreement, or otherwise, may rest partly in writing and partly in parol. So far as the present case is concerned a discussion of the proposition is purely academic. In this case the writings are complete. We submit that there is a controlling rule which excludes the consideration of any alleged parol stipulations in this case. It is a doctrine of quite universal application that all oral negotiations, or stipulations,

between the parties, preceding, or accompanying, the execution of a written instrument are regarded as merged in it. The Supreme Court of the State of Oregon, speaking through Mr. Justice Bean, stated the reason and scope of the rule in this language:

“The reason of the rule, as explained by judges and text writers, is ‘that the parties, by making a written memorial of their transaction, have implicitly agreed that, in the event of any misunderstanding, that writing shall be referred to as the proof of their act and intention; that such application as arose from the paper, by just construction or legal intendment, should be valid and compulsory on them; but that they would not subject themselves to any stipulations beyond their contract, because, if they meant to be bound by any such, they might have added them to their contract, and thus have given them a clearness, a force, and a direction which they would not have by being trusted to the memory of a witness.’ And, where a written contract appears on its face to be complete, no addition, to, or contradiction of, its legal effect by parol stipulations, preceding or accompanying its execution can be admitted, any more than its alteration through the same means in any other respect. The law controlling the operation of a written

contract becomes a part of it. The rule here referred to, so far as it extends, is inflexible."

Tallmadge v. Hooper, 37 Ore. 512.

The authorities cited under Point One *supra*, indicate that this rule is quite as inflexibly applied in the Federal Courts as in the courts of the various states.

II.

The papers appertaining to the settlement of the law action of Cronen v. Moore were deposited in the Security Savings & Trust Company annexed to, and in connection with, the escrow agreement relating thereto. At the same time, and in accordance with the terms of the settlement, the sum of \$3,000.00 was paid to Mr. Stevenson, attorney for Miss Cronen, and by him accounted for to her, which sum she has retained, and according to her own testimony, has applied to her own use. (P. 142, Trans.). Long before the expiration of the period of 90 days within which, according to the escrow agreement, the remaining \$3,000.00 was to be paid into the Security Savings & Trust Company, this sum was in fact paid into, or deposited with, such company to the order of the attorneys for Miss Cronen, in accordance with the escrow agreement, and notice given to Miss

Cronen through her attorneys that such deposit had been made. Prior to this time, and on April 4, 1912, and acting upon her own initiative, and without the advice of, or consultation with, her attorneys, Miss Cronen served notice upon the Security Savings & Trust Company of her intention to rescind her escrow agreement. We contend that she had no power or right to rescind the escrow contract. The decided cases uniformly hold that neither party to an escrow agreement can rescind or modify the same without the consent of the other, and that either party thereto at any time during the period fixed by the terms of the escrow contract may perform and demand fulfillment upon the part of the other. To this point are copious citations under Point Two. We quote from some of the decided cases.

In a case decided by the Supreme Court of Minnesota it was contended that one of the parties to an escrow agreement, by which certain deeds were deposited, had a right to withdraw the deeds from deposit before the expiration of the time fixed for the fulfillment of the agreement. Denying this contention the Court said:

“We are not able to adopt the view that the deeds to Thoraldson of the lands in question might be withdrawn by the

grantor or his successor in interest. The deposit in escrow would be an idle ceremony and entirely nullify the objects of the law if this were permissible. It is elementary that the deposit of a deed in escrow subjects both parties to the conditions upon which it was deposited, and that neither can withdraw from the same; hence 'the party refusing to comply with the conditions may be compelled to fulfill them, or the delivery adjudged upon fulfillment by the other party.'"

Thoraldson v. Everts, 87 Minn. 168; 91 N. W. 468.

In a decision by the Supreme Court of California it appeared that a contract for the sale of land was entered into, and at the same time a deed was executed and deposited in escrow to be delivered to the purchaser when certain conditions were complied with. Subsequently and before the expiration of the time for compliance, the vendor demanded of the depositary the return of the deed. It was contended in the case that the vendor had a right to withdraw from the contract at any time, and that the depositary was merely the agent of the vendor. The Court denied the contention that the depositary was the agent of the vendor, held him to be the agent of both parties, and with respect to the claim that the vendor could

withdraw from, or rescind, the escrow agreement said:

“We cannot concur in the view that Cox was the mere agent of the vendors, and held the paper as such, being bound to deliver the paper to the vendors when demanded of him by them. He was to hold it, and deliver it to the vendee when the money was paid; and the vendee was to make payment to Cox, and not to his vendors; and, further, to make payment to Cox for Austin, and not for his vendors. Cox held the release as an escrow, also to be delivered to Cannon when the purchase money was paid to Cox. The question is so clear that further discussion would darken instead of elucidating it.

“The deed being then delivered as an escrow, it is no longer revocable by the vendor, but it will take effect whenever the condition has happened or been complied with on which it is to be delivered. *Millett v. Parker*, 2 *Meto. (Ky.)* 608, 616. In this case the court said of a deed delivered as an escrow: ‘It cannot be revoked by the party who makes it, and he in whose favor it is made is entitled to it whenever the condition is complied with by which it becomes absolute.’ In *Shirley v. Ayres*, 14 *Ohio*, 308, it was held that the depositary of an escrow was as

much the agent of the grantee as of the grantor. The Court said: 'He is as much bound to deliver the deed, on performance of the condition, as he is to withhold it until such performance.' From this it would clearly follow that the grantor cannot recall the deed after the delivery as an escrow; and, when the condition is complied with by the grantee, he is absolutely entitled to it. The Ohio supreme court in the case of Shirley v. Ayres, above cited, held that, inasmuch as the depositary of the escrow was the agent of the grantee as well as grantor, the deed takes effect the moment the condition is performed without any formal delivery into the hands of the grantee. In other words, it may be said, when the condition is performed, the depositary becomes the custodian of the grantee, holding the deed for him, and this possession as such custodian is the possession of the grantee. We think this rule is based on sound principles, and should be upheld."

Cannon v. Handley, et al, 72 Cal. 133; 13 Pac. 318.

In a later case the Supreme Court of California had occasion to consider a like question and disposed of it briefly, as follows:

"The deed from the appellant, Huff, to respondent was, in the hands of R. H.

McDonald, an escrow. (*Cannon v. Handley*, 72 Cal. 133, 140, 13 Pac. Rep. 315; *Schmidt v. Deegan*, (Wis.) 34 N. W. Rep. 83.) And being so, it could not be revoked by the appellant. *Cannon v. Handley*, *supra*; *Knopf v. Hansen*, (Minn.) 33 N. W. Rep. 781. The depositary was not the agent of the vendor alone, but of both parties, and, as such, was bound to deliver the instrument on performance of the condition provided for in the contract under which he held it. *Cannon v. Handley*, *supra*; *Shirley v. Ayres*, 14 Ohio, 307; *Schmidt v. Deegan*, *supra*."

McDonald v. Huff, 77 Cal. 279; 19 Pac. 499.

In a case decided by the Supreme Court of Utah it appeared that a deed was deposited in escrow pursuant to a contract, and that at the time a part of the consideration was paid. Thereafter, and before the expiration of the time when the purchaser should perform, the successor in interest of the vendor sought to repudiate the escrow agreement, and recall the deed which had been deposited. The Court held that the vendor could not repudiate, or rescind, using this language:

"The depositary of an escrow is the agent of both parties, and a contract so made and deposited is not revocable at

the will of either party or their representatives, but may be enforced under the provisions of section 3935, Rev. St. If no date is fixed for the delivery or performance of the contract, a reasonable time is intended, and no default can attach until after a demand and failure or refusal to perform. 2 Warv. Vend. p. 774. The delivery of this deed in escrow rendered it absolute when the condition upon which it was made was fulfilled."

Gammon v. Bunnell, 22 Utah 421; 64 Pac. 959.

It will be observed that in the quoted text reference is made to section 3935 Rev. St. In an earlier part of the opinion this section of the Revised Statutes is set forth in full. It does not refer to escrow agreements or deposits, but generally to the enforcement of contracts made by persons who thereafter died before conveyance. It therefore follows that the statement of the rule that an escrow contract is not revocable by either party is not in anywise controlled by or dependent upon any statutory provision.

The Supreme Court of Kansas stated the rule tersely thus:

"Where a deed has been delivered as an escrow subsequent instructions by the grantor to the depositary can not change

the original nature of the transaction.”

Grove v. Jennings, 46 Kan. 366; 26 Pac. 739.

In a later case the same Court went into the question more at length, and the following interesting discussion is contained in the opinion:

“Contrary to the view of the plaintiffs in error, the depositary of an escrow is regarded as an agent of both obligor and obligee, and he can neither return the deed or other instrument to the former without the latter’s consent, nor deliver it to the latter without the consent of the former, save upon fulfillment of the agreed conditions. Roberts v. Mullenix, 10 Kan. 22; Grove v. Jennings, 46 Kan. 366, 26 Pac. 738; Lessee of Shirley v. Ayres, 14 Ohio, 307; Cannon v. Handley, 72 Cal. 133, 13 Pac. 315. In the case of Roberts v. Mullenix, *supra*, the delivery was made to the grantee without the knowledge of the grantor, and without fulfillment of the condition; but in the case of Grove v. Jennings, *supra*, a re-delivery to grantor was made without the authority of the grantee, and without default in the performance of the conditions upon his part. According to these decisions, the depositary of an escrow is not the agent of the depositor, merely; and the agreement of deposit cannot be rescinded by him alone, and the

escrow withdrawn at his will. It would seem to follow, then, that the death of the depositor could have no greater effect to terminate the agency of the depositary and work a recall of the escrow, than could be declared rescission of the contract of bailment by the depositor in his life-time. We can think of no agreements inter partes, terminable by death, which are not equally terminable by the express will of one or the other of such parties before death. It is said, however, that instruments such as those in question can take effect only by delivery; that delivery is the act of the obligor personally, or some one lawfully authorized to represent him; that the obligor, being dead, cannot make the delivery, and no one can make the same for him, because no one can perform an act for a dead person. We do not understand that a manual delivery of an escrow is necessary to invest the obligee with title to the same, or to pass to him the subject of the grant. Our own decisions are to the contrary, and likewise, we think, those of all the courts. 'A note placed in escrow takes effect the instant the conditions of the escrow are performed, even though the depositary has not formally delivered it to the payee.' *Taylor v. Thomas*, 13 Kan. 217. The delivery, therefore, is constructively made the moment the con-

ditions requiring the same are performed. The second delivery, whether actual or constructive, operates retroactively, and, by relation back to the first delivery, is substituted to it in time and effect. This doctrine of relation by effect to the first delivery was countenanced by Lord Coke, who said: 'If the grantee dies between the first delivery and the deed becoming absolute, the deed is good, for there was delivery begun in the life of the parties; sed postea consummata existens by the performance of the condition takes its effect by force of the first delivery, without any new delivery.' *Perryman's case*, 5 Coke, 84. It is likewise countenanced by all the authorities. *Peck v. Goodwin*, Kirb. 64; *Lessee of Shirley v. Ayres*, 14 Ohio, 307; *Taft v. Taft*, 59 Mich. 186, 26 N. W. 426; *Price v. Railroad Co.*, 34 Ill. 15; *Bostwick v. McEvoy*, 62 Cal. 496; *Foster v. Mansfield*, 3 Mete. (Mass.) 414; *Ruggles v. Lawson*, 13 Johns. 285; *Wallace v. Harris*, 32 Mich. 380; *Prutsman v. Baker*, 30 Wis. 644."

Davis v. Clark, 58 Kan. 100; 48 Pac. 565.

III.

This suit was the appropriate remedy to be invoked by Walter Baker Moore, defendant in the law action, to compel the delivery up of the papers deposited in escrow in accordance with

the stipulation thereof. The law action brought against him by Miss Cronen was still pending. The release executed by her, and to which Mr. Moore became entitled upon the payment of the last installment of \$3,000.00, was in possession of the escrow agent who refused to surrender it, unless required so to do by a decree of some competent court because of the notice of rescission given by Miss Cronen. The stipulation for the dismissal upon the merits of the law action was also in escrow, and in order to obtain possession of it, that it might be filed in the law action as a basis for a judgment of dismissal, it was necessary to invoke the equitable processes of this court. In a case quite analogous to the case at Bar the Supreme Court of the United States sustained the jurisdiction of a court of equity. *Clark v. White*, *supra*. Point Three. The other cases cited under this head are in point and directly sustain the jurisdiction of a court of equity.

IV.

It is likewise true that this case may be treated as ancillary to the action at law brought by Miss Cronen against Walter Baker Moore, and so considered, it was proper for the trial court to compel the fulfillment of the escrow agreement, direct a delivery of the papers de-

posited in escrow to the respective parties in accordance with the escrow agreement, and enjoin further prosecution of the law action. Many cases of this character have been brought and determined and the doctrine of these cases amply sustain our contention in this regard. In the law action there existed the jurisdictional amount and diversity of citizenship. The suit in equity in its essence involved the same amount in controversy in the law action, and in addition thereto there exists the necessary diversity of citizenship because it appears that the plaintiff is a citizen of Washington and the defendants are citizens of Oregon. However, in a suit ancillary to a law action, where the court had jurisdiction of the law action, diversity of citizenship is not material. This has been directly ruled by the Supreme Court in the case of *Dewey v. Coal Co.*, *supra*. It would hardly be profitable to pursue at any length a discussion of the proposition that considered as a suit ancillary to the law action the court had power to grant the relief prayed for. Out of the many decided cases upon this question we have selected but a few that clearly state the rule and collate and review the authorities generally. See cases cited under point IV.

V.

It seems to be contended by counsel for appellant that in some way the release which Miss Cronen signed of whatever claim she might have had, or thought she had, against Frank Allan Moore and Margaret Gleason Moore, his wife, and Miles C. Moore and the certificate which the two former were to sign, are in some way involved in the settlement of the law action against Walter Baker Moore, and complaint is made that, in the decree entered in the case at Bar, the court did not go further and require the delivery to Miss Cronen of such certificate. In our statement and discussion of the evidence we pointed out that this matter was entirely separate and distinct from the settlement of the law action against Walter Baker Moore, and further that this statement or certificate was produced in open court and tendered. At the expense of repetition we will again briefly review the evidence concerning this matter. The papers relating to the settlement of the law action against Walter Baker Moore consisted of

(a) Stipulation for the dismissal of the case, and

(b) Release of Walter Baker Moore signed by Miss Cronen, and

(c) A certificate entitled in the law action signed by Walter Baker Moore.

In the escrow agreement relating to the law action these three papers are specifically enumerated as the papers to be deposited, and the escrow agreement then recites in substance that a complete settlement of the law action has been agreed upon, that \$3,000 in cash has been paid, that the papers referred to are to be deposited in escrow with the Security Savings & Trust Company, that within 90 days from the date of such escrow agreement the additional sum of \$3,000.00 is to be paid to the Security Savings & Trust Company to the order of the attorneys for Miss Cronen, whereupon the papers deposited in escrow were to be delivered to the parties entitled thereto, as specified by the terms of the agreement. We thus see that so far as the law action was concerned the settlement was full and complete and had no reference to any other matter or thing whatsoever.

This suit was brought to compel the fulfillment of the escrow agreement, by the delivery of the papers to Walter Baker Moore to which he was entitled, and to restrain the further prosecution of the law action. The answer interposed by Miss Cronen in effect is a denial of the existence of the escrow agreement and a denial that any settlement was made. While

the answer contains several pages of matter in addition to these denials, nowhere is there pleaded any other or different contract than that set up in the bill in this case, nor does the appellant, defendant in the court below, ask for any additional relief than that sought by the bill. In other words, while appellant now complains that the decree should have been broader than it is and should have disposed of matters other than those involved in the controversy between Miss Cronen and Mr. Moore, the answer which appellant interposed lends no countenance to the contention that such additional relief was sought or desired. As a matter of fact there is now pending in the same court in which the present case was tried a suit in equity against Miss Cronen to compel the fulfillment of her agreement with respect to Frank Allan Moore, his wife, and Miles C. Moore. From what has been already said we submit it clearly appears that there is nothing in the agreements between the parties and nothing in the issues made by the pleadings which gives support to the contention of appellant.

The release of Frank Allan Moore, his wife, and Miles C. Moore, which Miss Cronen signed and the agreement with respect thereto, were introduced in evidence in the present case for the reason, as stated upon the trial, that in her

answer in this case appellant alleged that she had been induced by certain representations to sign a release purporting to release Walter Baker Moore, but which in fact released other members of his family as well, this contention being evidently based upon the recital in the release of Walter Baker Moore to the effect that it released him and his heirs and personal representatives. And the release of Frank Allan Moore, his wife, and Miles C. Moore, and the agreement with respect thereto, were offered in evidence for the purpose of showing that as a matter of fact she had executed an independent paper releasing Frank A. Moore and the others named in such release. The papers now referred to were prepared in the office of Logan and Stevenson, being dictated in their office to their stenographer in the presence of Miss Cronen. (Pp. 59, 60, 61 and 153, 154 and 155, Trans.). The release in question may be found upon pages 62 and 63, Transcript, and the agreement with respect thereto may be found on the preceding page. This agreement in substance provides that the release is to be deposited in escrow with the Security Savings & Trust Company, and upon the delivery to the trust company of a written statement signed by Frank Allan Moore and his wife, in the form set out in the agreement, for delivery to the attorneys

for Miss Cronen, the release is to be delivered to A. E. Clark. As fixing the time when this release was to be delivered, and the time when the certificate was to be delivered, it was provided that such delivery was to be made at the same time that the additional sum of \$3,000.00 was paid to the appellant, being the final payment in the Walter Baker Moore settlement. This provision was inserted merely as fixing the time, and for no other purpose; and as indicating clearly that the settlement of the law action against Walter Baker Moore was in no-wise dependent upon this collateral matter it is again recited in the agreement that, by virtue of another escrow contract, the papers relating to the Walter Baker Moore case were deposited in escrow with the Security Savings & Trust Company to be delivered upon the payment of the additional sum of \$3,000.00. The way the matter of the release of Frank Allan Moore, his wife, and Miles C. Moore came up was this:

After the Walter Baker Moore case had been settled and the papers prepared and executed, Miss Cronen suggested that she would like also to have a certificate from some other members of the family whereupon she was informed by Mr. Clark that if she wanted such a paper she would have to sign a release of the

people who were to make the certificate. (Pp. 64 and 65, Transcript). The two matters, however, were entirely distinct as Mr. Stevenson testified in substance. Two separate escrow agreements were prepared, one relating to the settlement of the law action against Walter Baker Moore, and the other with respect to the certificate Miss Cronen wanted from some other members of the family and the release which she signed with respect to them. (P. 75, Transcript). Mr. Logan testified in substance to the same effect. He testified that the settlement of the Walter Baker Moore matter was absolute (P. 94, Transcript), and that after it had been settled the matter came up in an incidental way concerning a certificate by some other members of the Moore family and it was then agreed, to satisfy Miss Cronen, that a certificate in the form then agreed upon should be procured, and that she should sign a release which would be deposited in escrow, and when this certificate, to be signed by the other members of the family, was received ready for delivery, the release would be delivered over. (Pp. 97 and 98, Transcript). As a matter of fact, the certificate by Frank Moore and his wife was procured, was ready for delivery and was tendered into court upon the trial of this cause. Miss Cronen claims that she understood

that the certificate to be signed by Frank Moore and his wife was to be produced and delivered within a couple of days, which indicates that she did not connect this matter with the settlement of the Walter Baker Moore case, because under the plain terms of the escrow agreement the balance of the money was not required to be paid for 90 days. Concerning the Frank Allan Moore and his wife papers, she testified:

A. What I object to is that you did not get them as you promised by return mail.

Q. What you object to is that you did not get them by return mail. Did you expect, if it got back by return mail, it would be given immediately to you?

A. Surely.

Q. And the release of Frank delivered to me?

A. Surely.

Q. Without payment of the additional three thousand?

A. The payment of the additional three thousand had absolutely nothing to with that—

(Pp. 144, 145, Transcript).

A little later on in her testimony Miss Cronen clearly discloses why she undertook to rescind the escrow agreement relating to the law action against Walter Baker Moore:

Q. Let's go back to the Frank A. Moore

matter. Then, as I understand it, getting right down now, you have eliminated a lot of these matters in controversy, apparently. The only thing then that you take exception to is this, apparently, that the Frank A. Moore and wife vindication did not come back as soon as you thought it should. That is, it didn't come back by return mail.

A. Well, the fact that they all laughed around the country, and Mr. Lee told it broadly and the boys told it broadly that they got a "cheap settlement because they had the goods on her." And every little while I went to the office "Have you heard?" "No, not yet, but be patient, they will come. They will come." Now, on the 24th day of May, Mr. Logan asked me to come down to the office.

Q. Mr. Logan?

A. Mr. Logan in May. That was Saturday afternoon; the ninety days were up and he says: "The only way for you to get the vindication out of escrow is to go down and release the bank from that." I said "I am not going to take that. I don't want that." I told him what had been said about me; the vilest things that had been said about any woman, after they had all promised, and you had promised as their attorney.

(Pp. 145, 146, Transcript).

Evidently Miss Cronen was laboring under the delusion that someone had been villifying her. She seemed to charge the offense against Mr. Lee, and in her mind in some way connected him with Walter Moore. Just how this mistaken notion found lodgment in her mind is difficult to say. Much is said in the brief of counsel for appellant of the wrongs that their client suffered. The zeal of counsel in behalf of a fair client is probably a sufficient excuse for their supplementing the record in this regard with the activities of a sympathetic imagination. It is sufficient to say that no where does the record disclose that Walter Moore, or any other member of the Moore family said aught in disparagement of appellant. If there has not been adequate compliance by Frank Allan Moore and his wife, with the agreement under which the release of them signed by Miss Cronen was deposited in escrow, such defense may properly be made in the suit brought for the enforcement of that agreement. If any time was fixed for the delivery of the certificate signed by Frank Allan Moore and his wife, by the agreement by which the release of them went into escrow, clearly that period was 90 days. Long before the expiration of that period Miss Cronen had served notice that she intended to rescind all escrow agreements. This notice of rescission

may be found on pages 109 and 110 of the transcript, is directed to the Security Savings & Trust Company, and among other things, recites "That you are hereby notified that I have rescinded any and all agreements heretofore made with Walter Baker Moore, Frank Allan Moore, Margaret Gleason Moore and Miles C. Moore or A. E. Clark, their attorney, etc.'" And yet upon the trial Miss Cronen would have the court believe that she did not know until the trial that there was any escrow agreement relating to the release of Frank Allan Moore, his wife and Miles C. Moore, or the certificate to be signed by the two former, ever made or deposited in escrow and that she at all times believed that the release referred to had been delivered to, and was in the possession of Mr. Clark. (Pp. 131, 132, 133, 134, 135, 136, 137, 138 and 139). While the evidence clearly shows compliance with the escrow agreement touching the Frank A. Moore, et al, papers, and shows that the certificate which Frank A. Moore and his wife were to sign was signed, produced ready for delivery and produced upon the trial, (P. 113), even if there was a technical non-observance of such an agreement it was waived by Miss Cronen by her notice of attempted rescission and by her conduct. Miss Cronen attempted to repudiate the escrow agreement with respect to

the Frank Allan Moore, et al, papers, as well as the other distinct escrow agreement made with respect to the settlement of the law action against Walter Baker Moore more than six weeks prior to the time fixed for performance. After that the parties to either of the escrow agreements were not required to do anything more than to hold themselves ready, willing and able to perform, and proceed in due time, and in a proper manner, to judicial enforcement of their rights. Speaking to this subject the Supreme Court of Oregon, said:

“It may be said to be well settled that such acts or declarations as amount to a rescission or repudiation of the contract, and an absolute and positive denial of any and all duties under it, may render strict performance before suit unnecessary, upon the ground that it would be a useless and a vain thing to tender the stipulated performance, knowing that it would not be accepted. The denial of the right to make the tender, or the positive and unqualified assertion by the party who may insist upon punctuality or exact performance that thenceforth he is not bound—and this state of affairs may be inferred from unequivocal acts as well as direct assertion—is, in effect, a waiver of strict performance, and a notice that the other party may as well proceed in due

time to the enforcement of the obligation, as otherwise no performance could be obtained at his hands: Brock v. Hidy,, 13 Ohio St. 306; White v. Dobson, 17 Gratt. 262; Maughlin v. Perry, 35 Md. 352; Deichmann v. Deichmann, 49 Mo. 107; Lowe v. Howard, 139 Mass. 133 (29 N. E. 538); Gray v. Daugherty, 25 Cal. 266; Baumann v. Pinckney, 118 N. Y. 604, (23 N. E. 916); Brown v. Eaton, 21 Minn. 409; Mattocks v. Young, 66 Me. 459; Dulin v. Prince, 124 Ill. 76 (16 N. E. 242); Mansfield v. Hodgdon, 147 Mass. 304 (17 N. E. 544).

Clarno v. Grayson, 30 Or. 126, 127.

The following cases are likewise to the same point:

Hills as Receiver v. National Albany Exchange Bank, 105 U. S. ———; 26 Law Ed. 1052.

Dublin v. Prince, 16 N. E. 243.

Baumann v. Pinckney, 23 N. E. 909.

Mansfield v. Hodgdon, 17 N. E. 548.

Holt v. Trust Co., 21 L. R. A. (N. S.) 691, 72 Atl. 301 (N. J.)

Weinberg v. Naher, 51 Wash. 591, 99 Pac. 736, 22 L. R. A. (N. S.) 956.

Gray v. Smith, 83 Fed. 825.

State of Louisiana v. Police Jury, etc., 14 L. R. A. (N. S.) 794; 45 Southern 47.

Wright v. Astoria Company, 45 Ore. 228-229.

Boyd v. American Savings & Trust Co., 82 Fed. 904.

In conclusion it may be fairly insisted that the right of appellee to the decree entered in this case was established beyond all controversy. The amount paid appellant by appellee in the settlement of the law action, considering all the circumstances, was generous. In that case she was represented by two able and respected members of the Portland Bar whose zeal and fidelity in behalf of their client cannot be doubted. The negotiations which resulted in the settlement covered a period of months, during which time these attorneys representing Miss Cronen insisted with vigor and pertinacity that their client should receive in settlement a much larger sum than the defendant in that case was willing to give. Their labors in this regard resulted in securing for their client a sum which even they must admit was quite adequate. All of the details of the settlement were agreed upon after much discussion and consummated in their office, and in the presence of their client who, according to her own testimony and the testimony of these attorneys, examined with almost suspicious care everything that was done. The evidence of these attorneys

in support of the settlement is clear and emphatic to the point that what was done was done understandingly by all of the parties.

Under these circumstances, we respectfully submit that the decree appealed from should be affirmed.

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